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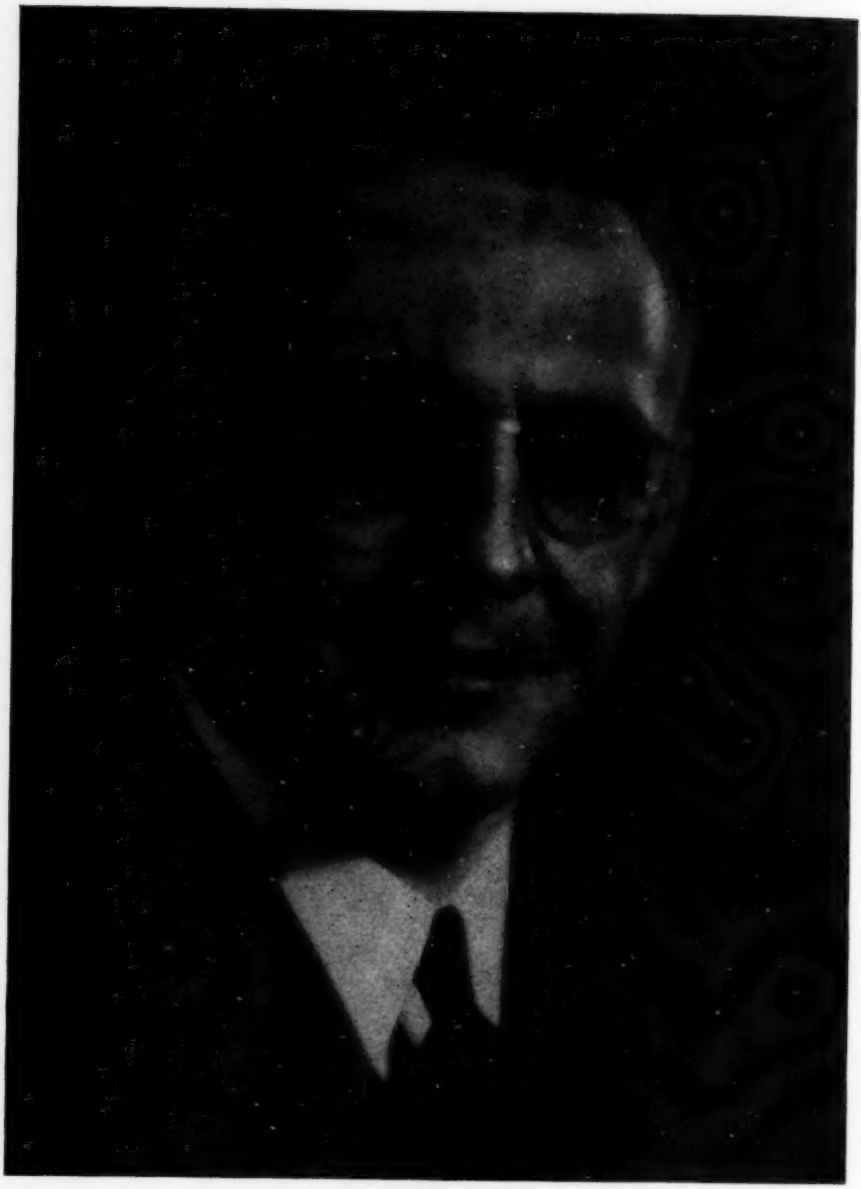

PAUL J. MCGOUGH
President, International Association of Insurance Counsel
1946-1947

President's Page

IN THE quarter of a century that our Association has been in existence, insurance has become increasingly important, not only to business generally but also to practically every individual. As the years have passed the legal problems arising from insurance have become more varied and complex. The membership of our Association can be proud of the invaluable service it has rendered in solving many of these problems. With "Service" as our theme and purpose, we can be counted upon to render equally noteworthy contributions in the future.

We must be mindful that our Association can preserve its present position of influence in the insurance world only through the continued cooperation and active participation of all its members. I am confident that we can count on your enthusiastic support.

I am deeply appreciative of the honor of being chosen the 15th President of this Association. With your helpful assistance I shall humbly strive to continue the excellent leadership of our retiring President, F. B. (Bill) Baylor, and his distinguished predecessors in office.

The record-breaking attendance of 412 members and their families at this year's meeting at Galen Hall is evidence of the fact that the war years have not dampened the keen interest and enthusiasm of our membership. Many new members and returning veterans of the war were present. The interest shown by all members attending the Convention was indeed gratifying.

We have been deluged with requests that our next Convention be held at the Greenbrier Hotel, White Sulphur Springs, West Virginia, and tentative arrangements have already been made with the management for September 2, 3, and 4, 1947. The management writes us:

> "The question of accommodations for 1947 depends entirely upon the development of our rehabilitation program, and it will be our pleasure to advise you from time to time as to the progress of that work, and at the earliest possible moment as to whether or not we shall be in a position to accommodate your very excellent group in 1947. We hope to have a better Greenbrier in every way than the previous one and we feel certain that our facilities for the care of a group like yours will be eminently satisfactory to your membership."

So we will keep our fingers crossed with the hope that we may again enjoy the grandeur and beauty of White Sulphur Springs.

PAUL J. MCGOUGH, *President*

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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America, or any of its possessions, or of the Dominion of Canada, or of the Republic of Cuba, or of the Republic of Mexico, who are actively engaged wholly or in part in practice of that branch of the law pertaining to the business of insurance in any of its branches, and to Insurance Companies; for the purpose of becoming more efficient in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada or in the Republic of Cuba, or in the Republic of Mexico; to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

Address of Welcome

By Henry L. Snyder
Allentown, Pa.

YOU may be assured that I regard this privilege of welcoming you to Pennsylvania as an undeserved honor. The reason, however, for my part on this program is none too flattering. The gist of the request was to the effect that "since you live so close by, you might just as well do it." Perhaps, nevertheless, someone discovered that in my line of progenitors there was Governor Simon Snyder of whom it may at least be said that one of our Counties was given his name; but, there is something about his family that has impressed me far more forcibly. It occurred while the family was returning home from his inauguration. It is said that one of his proud children asked the mother— "Mom, now are we all Governor of Pennsylvania?" Mrs. Snyder very promptly replied: "No, only Pop and I." Nor, could it be that I was chosen to represent Pennsylvania because, in years far more tender, I had the temerity of choosing to be an anti-new deal candidate for Lieutenant-Governor of our fair State. The record of that campaign surely speaks for itself. What gruesome mathematics evolved! For every speech, I lost two thousand votes. One hundred of them I made—my opponent made none and I lost by two hundred thousand votes. Surely, that calamity could not have brought me to this very pleasant position. And, indeed, it is always pleasant to welcome people to Pennsylvania, and the pleasure is even greater when men with their gracious ladies travel far to honor us, as you have done. We are deeply grateful to the officers of the Association for selecting this spot which we believe you have even now found acceptable.

It is undoubtedly within my province, if not my duty, to speak proudly but not boastfully of our great State and of this particular part of it. Here we convene, as it were, still in the sphere of influence of William Penn, the great founder of a Commonwealth of good will and tolerance. The passing of two hundred sixty-four years since his arrival has but enlarged his stature among all men who have learned of his philosophy of forbearance, stability and independence. Truly, he set into action a type of thinking which has been termed a practical idealism and which has brought to this State her progress and high position.

Just as you do of your own States, the sovereign rights of which I personally hope will be promptly restored and preserved, (and I include Pennsylvania), we enjoy referring to our "firsts;" that is, to those distinct contributions to the progress of mankind without which we would be most seriously retarded.

Since all of us are directly interested in insurance, great satisfaction may be found in the list of Pennsylvania's "firsts":

First almanac, in 1685; first paper mill, in 1690; first school book, in 1698; first botanical garden, in 1705; first almshouse, in 1713; first labor union, in 1724; first public library, in 1727; first fire company, in 1736; first magazine, in 1741; first lightning rod, in 1749; first public hospital, in 1751; first fire insurance company, in 1752; first life insurance company, in 1759; first night school, in 1762; first medical school, in 1765; first theatre, in 1766; first daily paper, in 1771; first bank, in 1780; first English Bible, in 1782; first law school, in 1790; first mint, in 1792; first marine insurance company, in 1792; first title insurance company, in 1876.

Therefore, today again, we laud our forefathers for this formidable array of achievements and more especially do we as lawyers and as members of this Association pay tribute to their wisdom, vision and sacrifices.

It may be of interest to you, who may be visiting this Community for the first time that, within fifty miles of this Convention Hall, there are parts or all of nineteen counties of Pennsylvania wherein dwell almost three and one-half million of our people. Their industrial products, in the last peace-time year (1941) were valued at more than three billion dollars; their agricultural and mining products were of equal value. Yet in this same area, there lie a million and a quarter acres of forest lands.

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INSURANCE COUNSEL

GEORGE W. YANCEY, *Editor and Manager*
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Here too, you find some of the most interesting historical shrines of America. Closest at hand, are the ancestral homes of the family of Abraham Lincoln (privately owned but still standing), the birthplace of Daniel Boone (open to the public)—the home of Conrad Weiser who perhaps did more than any man to keep the Indians from joining the British forces during the Revolution (this house is also open to the public)—the famous Cloisters at Ephrata founded in 1722 by the Seventh Day Adventists and the home and tomb of President James Buchanan.

In the neighboring County of Montgomery, on your way to Philadelphia, lies the hallowed vale known to all as Valley Forge; there too, is the home of Audubon where he wrote his great book on The Birds of America and at Trappe, where the first Lutheran Church in America was built in 1743, Henry Melchior Muhlenberg began his mission in America and there his two famous sons, General Peter Muhlenberg and Dr. Frederick Augustus Muhlenberg were born.

To the east are Lehigh and Northampton Counties; the former has, still standing and open to the public as a museum, the home of James Allen, built in 1770 as a hunting and fishing lodge. In Allentown, Zion's Church was the hiding place of the Liberty Bell while the British occupied Philadelphia. Should you find time to do so, you can, within the hour, visit the game preserve near Allentown, where herds of deer, elk and buffalo roam about in conditions approximating wild life; you may see the fine old buildings in Bethlehem, built by the Moravians before the Revolution and then used as a military hospital; there too, stands old Sun Inn whose list of distinguished guests includes General and Mrs. Washington, General Lafayette, and many other eminent persons. You could visit the spot from which General Sullivan started that noteworthy campaign against the Indians which included one-third of Washington's Army and which practically obliterated every Indian settlement and village from Easton, Pennsylvania to a point beyond Elmira, New York. On this short trip to the East, you might visit the beautiful campuses of Albright College in Reading, Muhlenberg and Cedar Crest in Allentown, Lehigh University and Moravian College in Bethlehem and Lafayette College in Easton.

Westward and, in an equally short time, you might wish to see Indiantown Gap where thousands of our boys were trained and equipped for the present war, the famous farms of Lancaster County, Franklin and Marshall College in Lancaster, Lebanon Valley College in Annville, the model Town of Hershey, world renowned for its chocolate and fine industrial school, and, the beautiful State Capitol at Harrisburg with its famous mural paintings done by Edwin A. Abbey and Violet Oakley.

We of Pennsylvania have almost come to assume that everyone is well acquainted with the historical shrines located within the area of Philadelphia. There, towering high in importance above all others, is the old State House, housing the Liberty Bell and known as Independence Hall. Our national independence was first formally declared there; our first Continental Congress met in Carpenter's Hall. In the pews of old Christ Church sat Washington, Franklin, Betsy Ross and many other notables. Philadelphia provides opportunities for you to visit her art museums, the Franklin Institute, Fels Planetarium, the University of Pennsylvania, Temple University and in her suburban territory the colleges of Haverford, Swarthmore, Bryn Mawr and Ursinus.

Many believe that the stoutest pillar of any democracy is religious freedom. Here at home we consider ourselves most fortunate because the first law ever enacted by any Assembly in Pennsylvania (December 5, 1682) was a guarantee of religious liberty and what a glorious part the colonial fathers, living in this area, played in

establishing the religious tradition of the State. To these forests came the Quakers in 1682, the Mennonites in 1683, the Baptists in 1684, the Episcopalians in 1695, the Lutherans in 1703, the Dutch Reformed in 1710, the Amish in 1714, the Catholics in 1720, the German Baptists in 1723, the Schwenkfelders in 1734, the Moravians in 1740, and the Jews in 1776.

It will therefore be understandable why Pennsylvania today shelters more than one hundred different religious groups and why church membership here exceeds five million. If religious intolerance were ever to gain a foothold here, it would be in direct violation of the strong purposes of courageous men and women who selected these very hills from which they might proclaim their hatred for ancient persecutions.

By this time, my friends, you may have concluded that we who live here, think quite well of our home land, but, may it be remembered that we do not for a moment minimize the grandeur of the Rockies, the beauty of the Shenandoah Valley, the exhilerating climate of the Catskills, or the effectiveness of the moon over Miami. It is only to be regretted that most of you will not have sufficient leisure time at your disposal to inspect at least parts of our twenty-eight State Forest Parks, the million and one-half acres of public game lands, the ten thousand miles of fishing streams, the one hundred sixty-eight airports and the eighty-five thousand miles of improved highways. Frankly, if it were not for the certain and equally dangerous competition which would follow we would want you and your families to move to Pennsylvania before the end of this year. In this Community, known to many as the "Pennsylvania Dutch" section of America, folks are still following in traditional fashion, their daily tasks with diligence, but, they are also thinking, and thinking seriously, about many disturbing issues. It might be well for you to know that, because of these issues, there is not a complete rejoicing over recent great victories won. Were you to engage the average man on the streets in conversation, I believe you would find him longing for, and anxious, about an early return to greater simplicity in all things, of the Jeffersonian theory of less Government and more freedom for the individual, of the prompt disappearance of high powered pressure groups and the shameful yielding to them, of the re-establishment of uniform government by law and less by man, of a firm declaration to keep our hemisphere so strong that all aggressors will be cautious, of forthright pronouncements to all nations with whom we are willing to cooperate in the building of permanent peace, that there is far less of the Chamberlain character in us than at least a few of them assume. In short, our average man wishes to lift his head high in an atmosphere of freedom and individual dignity; he wishes to be friendly but unfettered, cooperative but unregimented—humble in Godliness but powerful in his own convictions.

The work of this convention will proceed in the midst of folks who cling to such hopes and who are indeed honored by your presence. The program, published in advance, gives assurance of ample opportunity to advance the purposes of this Association, viz: to create closer contact of our members, to become more efficient, to promote the interests of insurance in all its increasing branches and to encourage cordiality.

We of Pennsylvania do not only cheerfully welcome you but happily devote ourselves to your well being and comfort. This convention should, in all respects, be our greatest and one long to be remembered and, looking beyond the fixed limits of our Association, it is my own humble belief that it will serve as a valuable contribution to our constant hopes for a better America and not for a new America.

Response to Address of Welcome

By E. A. Henry
Little Rock, Arkansas

I APPRECIATE the honor which has been conferred by giving me the opportunity to make the response to the address of welcome on this particular occasion. I arrived in this beautiful setting feeling mentally sufficient and in a mental attitude comparable to one of Pat Eager's Mississippi negroes who had recently re-

turned from overseas, when on the streets of Jackson recently and on a Saturday evening when negroes walk and talk to themselves, it was observed that this particular negro was dressed in a fashion which is common to members of his race, in that he was fully dressed in a "zoot suit" with a green feather in his hat and was walking down the street singing, "Ah got the worl' in thu jug and the stoppa in muh han'," but I am frank to tell you that after listening to the eloquent address of welcome which flowed from the lips of the distinguished Senator, and to my introduction. I feel inadequate, unnecessary and confused, and the nearer we get to Washington these days the greater grows our confusion. I heard it said recently that Washington is a veritable mad house and the only one where the inmates run the institution.

The question might perhaps be asked how could an individual from the Deep South, as I, or from any other section of the country, respond to an address of welcome and at the same time express the sentiments of this organization, the personnel of which hails from the various corners of our nation. The answer to that can be made and easily understood when I state to you that I believe when reflecting about confusion, that we are all confused. Such mental condition no doubt caused the majority of the members to assemble here on this particular occasion. If the various insurance lawyers and executives who have to do with the operation of insurance companies have been able to operate within the past twelve months or more without finding themselves constantly in a state of confusion, then I am surprised. The ever-changing precedents as pronounced and set forth by the courts of this country oft times cause us to recall a dissenting opinion in a recent case in our United States Supreme Court wherein one of our able Justices appropriately remarked in substance that the ever-changing decisions of this Court are like the purchase of a one-way ticket—good only on this day and on this train.

There are many other conditions which make our problems mutual and one and the same, among which are that certainly we are all engaged in one great undertaking of trying to preserve some semblance of the freedom which we inherited from our forefathers, and trying to preserve some semblance of the right of free enterprise, but with all of the restrictions, prohibitions, rules, regulations, directives, orders and amendments thereto directed at freedom of action, we can still meet on such an occasion as this, and we should be grateful for a form of government that makes it possible for us to so meet and to give free expression to our thoughts, if any. In fact we are the only people who to any great extent, with the possible exception of the Dominion to the north, enjoy the right of freedom of speech, freedom of thought and freedom of action. In fact, if need be, we could even sing and give expression to the happiness that is in our hearts, as was once characteristic of the people of other nations. But can others do it? No. The countries where once abode a free and happy people and who are best known as those who gave vent to their merriment, such as Germany and Italy and others, are they singing today? No, nor are they singing in most countries throughout the world because a hungry, sad and miserable people do not sing, and they do not convene for the purposes and under the conditions in which this Convention is being held today! Such freedom is enjoyed by all of us and can be expressed by anyone. In fact the distinguished Senator who has given us an address of welcome can do so and we at the same time know he means it, and we can respond to that address of welcome and he can know that we mean it, for after all this is America!

I am particularly glad, Senator Snyder, that we are meeting in the State of Pennsylvania, the Keystone State! The State in which is located the City of Brotherly Love! A great State by any yard stick! You have so much history; history which we of the West, Middle West and South claim as part and parcel of our history and as our own great heritage. The greatest thrill I ever received in my life was when I stood beside the Liberty Bell, where it is enshrined in Philadelphia, and reached out and reverently touched it. I felt as though I had touched the hem of His garment. And then when I walked inside Constitution Hall when I was in Washington, and knew that I was where Washington and Ben Franklin and Jefferson and the other great of our nation had brought forth the

greatest document ever to come from the mind of men—well, I can't tell you what my emotions were then—but you know, because you have had that selfsame experience and it is these experiences, this reverence for the great things in our history, this passionate love of freedom and of the safe guards placed around that freedom by the Founders, that in this day and time remind us of the Biblical injunction "Forsake not the ancient landmarks which thy fathers have set!"

I firmly believe that our visit to your State will make us better Americans, and, in conclusion, Mr. Chairman and the distinguished Senator from Pennsylvania, may I state to you that we are all happy to be here and participate in this Convention and we sincerely hope that you will enjoy us as much as we will enjoy you.

Report of F. B. Baylor, President

Lincoln, Neb.

IN the early days of the Association the programs included an "Address by the President," which was an important feature of the first assembly. Some of those addresses were on subjects such as, "The Object of the Law" and "Stability and Progress of the Law." That was before Justices Jackson and Black came to grace the bench of our highest court. It seems that the precedent set by those able presidents and peerless speakers, Willis Smith and Pat Eager may well be followed. By the programs at which they presided the "Address of the President" was designated as the "Report of the President." After the passage of two years since we met last, an account of this "long count" administration certainly is in order and well might be demanded.

During the dark days of 1945 when, as a nation and as individuals we were gripped by despondency and fear, the holding of a general meeting not only was inadvisable but was impossible. At New Orleans the executive committee decided that, in the absence of a favorable turn of military operations early in the summer and a consequent change in travel regulations, the annual meeting should be postponed for a year. Even though it then appeared, and later developed, that the conclusive and final turn for which we all were praying was not to come until late in the summer, a tentative reservation was made at the Edgewater Beach in Chicago for September 5th to 8th. A program was arranged and had the meeting become possible, it could have been called on short notice. With one exception, all those who would have addressed you in 1945 are on the program which you have before you. The one exception said he would rather sing than talk and without doubt we shall be favored by his nocturnal efforts during the three days of our gathering.

One of the subjects considered by the executive committee at its meeting in 1945 was the tenure of those members of the committee and the officers whose terms would expire in September of that year. The by-laws provide for the filling of vacancies by the executive committee but make no provision for an election other than at the annual meeting of the Association. The president and others whose terms would be extended in the absence of an election, offered to resign and thereby make it possible for the remaining members of the executive committee to fill the vacancies. After considerable discussion it was decided that in the absence of any precedent, no action on the question should be taken. It seems unlikely that it will be necessary to forego the holding of any future annual meeting; two, however, have been cancelled in the last five years and, if you think something should be done to eliminate, and you disapprove of, this holding over, you should take some action looking toward the amendment of the by-laws.

Since the annual meeting could not be held in 1945, it was thought best that the executive committee meet the early part of this year in Chicago. That city was selected because there, it was thought, a large number would attend an augmented meeting, if it were thrown open for general attendance. Almost a hundred joined in the social hour and banquet held on

February 2nd. Shortly before the meeting in Chicago approximately a hundred members of the Association got together in New York for lunch and an hour of good fellowship. Such meetings afford most convincing evidence of the enthusiasm of those who are members of our organization and are proof of the high regard in which it is held.

In February, 1945, a year and a half in advance—a request for a reservation for this meeting was made of the Homestead Hotel at Hot Springs, Virginia, where in the past, we have been comfortably housed and pleasantly entertained. In answer to such request, we were told that, at no time either in August or September, could more than two hundred fifty be accommodated and not before November could a group the size of ours be received. Thereupon an earnest endeavor was made to find a meeting place. You are very much mistaken if you think that the discovering of a hotel with acceptable facilities for the entertainment of five or six hundred discerning guests is easy. Among those which appeared to have the necessary facilities and which showed an interest in our meeting were the Balsams at Dixville Notch, New Hampshire, The Inn at Buck Hill Falls, Pennsylvania and the Mount Washington at Bretton Woods, New Hampshire, the latter made famous by the monetary conference which was held there. Every one of these hotels we should have enjoyed after we got there, but they apparently were intended for a clientele who need not resort to the railroads for transportation. You may think that getting to Galen Hall is rough, but by comparison it is on the main line. You of course, have been inconvenienced and all would have liked to have had more commodious rooms, but you have cooperated wonderfully. It may be that in the not too distant future the demands upon the desirable hotels will subside a bit and we can obtain the bedrooms, baths, parlors and suites which we feel go with an International convention.

Doubtless you have read with interest and genuine profit many of the reports of the standing committees as they have been published in the *Journal*. Some of these are real and valuable contributions, as is evidenced by the fact that George Yancey receives many requests for additional copies of the issue in which a particular report appears. It seems self-evident that a member's interest in an organization is in direct proportion to the work he does for it. Not only does every member of a committee have a right to contribute to the report which is compiled and to be given by the chairman some assignment, but the Association has the right to receive the benefit of his earnest effort. To this end it is fitting that every chairman delegate to each member some part of the work to be done and he who has accepted a place owes the duty of prompt performance. Thus only will the report, when completed, represent the combined efforts of all those who sign it. The first appointment given to me was as a member of the program committee. I still remember my disappointment when, upon accepting the place and offering to submit suggestions, I was told there was nothing for me to do because the program already had been prepared. Appointments intended only as recognition of the appointee not only are without any merit but actually are harmful.

During the two years just passed everyone who has been a regular attendant at the annual meetings has had a place on a committee. It is probable that not everyone has received the assignment which he preferred but he has had an opportunity of furthering one of the most important purposes of the Association—the cooperative development of the various phases of insurance law. It is by his work on a committee that a member discloses the part he is willing to take in other affairs of the Association. Those who have given of their time and effort in committee work should have an opportunity of extending their field, and from them the Association should select its officers and members of the Executive Committee. They are entitled to recognition and an opportunity to express their counsel and advice; the Association is entitled to the further benefit of their services.

In addition to the seven standing committees specifically designated by the by-laws, five others namely; those on Aviation Insurance Law, Highway Safety and Financial Responsibility, Home Office Counsel, Practice and Procedure, and Unauthorized Practice have been functioning for several years under the authorization given to them only by the executive com-

mittee. Of those just named the field of some has become greatly enlarged and extremely important while the urgent need of the others seems no longer to exist. A recommendation that a new committee on Automobile Insurance Law to devide the work of the Casualty Law Committee be established and that the Home Office Counsel and Unauthorized Practice Committees be discontinued will be made and will be given consideration by the executive committee. Your thoughts on the subject will be valuable and are desired.

You made me very happy two years ago when without a dissenting vote you adopted the recommendation of the nominating committee. The hearing of that report with the expression of its approval and the receipt from a similar platform and by mail of your congratulations was a delightful experience which never will be forgotten. I am not like the man in an Abraham Lincoln story. Someone asked Mr. Lincoln how he liked being president; he replied, "Down in Kentucky they tarred and feathered a man and while they were riding him on a rail, a by-stander asked how he like it. Mr. Tar and Feathers said, 'If it weren't for the honor, I'd rather get off and walk'." I have enjoyed the honor and every minute of the ride.

The best wishes of the members of the executive committee and officers who are about to retire are extended to those whom you will honor at the election on Friday.

The Home Office and the Trial Attorney

By Paul C. Sprinkle
Kansas City, Mo.

YOU will note from the subject that it is a dual one. I was somewhat at a loss as to whether I would chastise the home office counsel first, or the trial attorneys first, but after due deliberation decided to talk about the home office counsel at the outset and thereby warm up for a real scolding of my brethren.

It is doubtful if the average trial lawyer realizes the type of client he represents when he is engaged in insurance trial practice. Our usual client is a layman and can furnish us with no assistance except as to the facts. In insurance litigation the trial lawyer finds himself not representing a layman, but another lawyer or group of lawyers. Because of that relationship which is peculiar to this type of legal representation the conduct of a trial should be on a different basis than where the client is a layman. By this I mean that there can be mutual assistance from both attorney and client, and in addition to this factor there should be a complete understanding. In discussing this unusual relationship I intend to approach the situation by considering a few "don'ts." When I have finished you will likely think of many "don'ts" which have not been discussed but it must be remembered that this talk must come to an end, and it would be absolutely impossible to discuss in a short time all of the situations that might arise.

The first "don't" with respect to home office management can best be expressed by stating that the home office should never "second guess" the trial attorney. If there is any one thing which will give a trial attorney a severe case of the litigation jitters it is to realize that he is proceeding largely under his own responsibility. I named this "don't" first because a trial lawyer seldom has such an experience. It can be stated without contradition that if the trial lawyer feels that he is continuing the trial at his peril that usually a poor job will be done. After all the trial lawyer does not make the facts nor the law. He must accept the case as he finds it and do the best he can under the circumstances. Therefore, there should be a complete understanding before any case is tried with respect to the relative danger of the trial; and in passing I might state, that it is just as much the duty of the trial lawyer as it is the home office counsel to see that there is complete understanding as to the dangers of the trial before the actual trial has commenced.

The average trial lawyer knows little or nothing about how the Home Office of an insurance company is conducted. He

has heard about reserves, reinsurance, claim committees, and official home office examinations, but there his education has ceased. It is my judgment that an insurance trial attorney should have some knowledge of these home office procedures. He should know that it is important that the reserve in a case should be adequate. He should understand that under certain circumstances that the home office of the defending company must make reports to the reinsurance company. He should know that if a matter in litigation is not adequately reserved that then that throws off even the financial statement of the company if the loss materially exceeds the reserve. The home office should impress upon the trial attorney the fact that it is important that all of the information possible about pending litigation be promptly referred to the home office. The home office should make it quite clear to the trial attorney if anything new develops which changes the liability of the litigation for the worse that that should be immediately reported in detail. Many times unusual situations arise at the very last minute. I had one to recently occur a week before the case was set for trial. The case had been pending for several months. The defendant lived in another city. He had been interviewed by claim representatives and a statement had been taken from him. He held an executive position with a large corporation and all the information that had been secured indicated that he would make an excellent witness and a good impression before a jury. A few days before trial he walked into my office and to my surprise walked with a very unsteady gait. I immediately inquired about his disability and found that he had had a stroke some twenty (20) years before which had caused him to be crippled. Every one who had interviewed him had seen him sitting at his desk, and no one was to blame for not knowing about his condition. This situation naturally effected the value of the case because it was a right angle collision at an intersection and I felt sure that the jury would feel that due to his physical condition he might not have acted as quickly as if he had been normal. It is sufficient to state that I immediately notified the insurance carrier of this material change and a settlement was then effected.

If the home office by some sort of education will impress the trial atorney with respect to reserves, reinsurance and official examinations it will be beneficial not only to the trial attorney but will also assist the home office claim department in being prepared for changes and unusual conditions, which have not been anticipated. It has been my experience that when the average trial lawyer is asked about reserve that he is somewhat at a loss as to the proper reply to make. The home office should give him some idea about the reserve in various types of litigation and what the inner workings of the office are so that the trial attorney may be of assistance.

It has been my experience that some home offices will never tell the trial attorney the amount of insurance coverage. I assume the reason for this conduct is that it is felt that if the trial atorney knows that there is large coverage that he may be more generous with the company's money. I seriously doubt that this is true. I feel that the danger which often results from this practice far exceeds the benefits. The amount of coverage is something which the opposing counsel can many times discover through various sources. It is embarrassing to the trial attorney in a casualty case to assume that the coverage is 5/10 and conduct himself accordingly, when in fact, the opposing counsel knows to the contrary. The very minute that attorney for the plaintiff feels that attorney for the defendant is attempting to withhold or mislead him then the chances for settlement and the chances for necessary agreements before a pending trial are practically eliminated. Therefore, it is my conclusion that there should be a full disclosure of coverage to the trial attorney with respect to all litigation. Otherwise he may be placed in a very embarrassing position with opposing counsel.

In many instances policies are written in which the insured retains the right to at least be consulted about the settlements and in a few instances as to certain losses it will be the policy of the insurer to vigorously contest all claims and suits. If these unusual conditions exist a full disclosure should be made to the trial attorney. He then knows why the so-called 'Nuisance' settlements are not made and why dangerous litigation is defended.. If

the trial attorney understands this situation then quite frequently he can frankly state to opposing counsel that no settlement will be made and that the case will be tried. By this means he will discourage similar litigation and the desired effect will be attained. No doubt many of the trial counsel present have had such litigation and I believe that each one of you will agree that the home office should make a full disclosure because that permits the trial counsel to attain the end and accomplish the purpose of the home office.

Perhaps, the most distressing and exasperating period in the litigation of a case is the situation that arises at the last moment with respect to offers of settlement. Don't criticize the trial attorney because of a last minute offer of settlement. It is likely the lowest offer which he has received and it may be the lowest offer that will be received pending trial. It is his duty to submit that offer. I feel safe in stating that lawyers the country over are all alike. There is something about the atmosphere of the commencement of any trial, which will usually cause the attorney for the plaintiff to desire to make settlement. This atmosphere not only affects the attorney, but the plaintiff. In view of this situation, which does, and will always exist, there should be full cooperation between the home office and the trial attorney. The home office should welcome a telegram or long distance telephone call, and in my experience I have had the home office state in advance that if any interesting offer of settlement is made that that offer should be communicated at once. The home office counsel should make it perfectly clear to the trial lawyer that he understands about last offers of settlement, and should make it perfectly clear that it is not weakness or negligence on the part of the attorney in reporting last minute offers of settlement.

Last, but not least, the home office should never receive satisfactory results without comment. All lawyers are vain at all stages in life and just a word of praise means more as to the next piece of litigation than perhaps anything which can occur. It may be the feeling of the home office that by acknowledging satisfaction that they will be charged more. Perhaps, that is true, but I am not so sure but that the trial attorney should be paid more for satisfactory results.

Let us now turn for a few minutes to the trial attorney. He is the general in the law suit. The result of the litigation depends upon his ability, his courage, his knowledge and his industry. Aside from all this there is always one dark cloud upon the horizon which haunts every trial lawyer, and that 'Bugaboo' can be best expressed by the word 'Fear.' Every trial lawyer, old or young, experienced, or inexperienced, always is affected by some phase of fear. He is apprehensive about the facts, the law, the conduct of the trial, the witnesses, the judge, the jury and the ultimate results. It can perhaps be safely stated that in no instance can this apprehension be completely eliminated. However, there are a few 'don'ts,' which in my opinion, will be of material assistance in the defense of insurance litigation.

At the outset, don't ever agree to win a law suit. In many instances because of the delight in receiving another piece of litigation and thereby being permitted to buy another meal in which meat will be served a trial counsel will unthoughtfully report that this is an easy one and there is no question but what the case may be won. Home Office Claim Departments have a faculty of believing what trial counsel put in their letters. Such a statement only misleads the home office into a belief that the case is groundless and that, therefore, the reserve should be small. But, when adverse conditions arise and the case becomes more serious and the trial counsel is compelled to state that the result of the trial will be doubtful, he has not only placed himself in an embarrassing position, but has also embarrassed the home office. By what I have said I do not mean that a trial counsel should make it appear to the home office that all litigation is bad and that the satisfactory result is exceedingly doubtful. The thought which I intend to convey is that statements about the results should be made last, and not first. Predictions should be made after the law is examined, the witnesses interviewed, depositions taken, physical examinations made and then a prediction should be made after a consideration of all of the elements, which go to make up the value of a contested case.

You can't brush aside those requisites without fatal results.

The trial attorney should never expect to win a law suit because of an anticipated 'break.' The 'break' which occurs infrequently in a law suit is an unknown element, which should never be taken into conisderation in estimating the true value of a case. My reason for making this statement is that breaks which win law suits occur so infrequently that they form no sound basis for deciding the result or setting the reserve. In illustration of this point, I recall the trial of a case in which a small boy had been thrown from a merry-go-round and a suit was filed for the resulting injury, which was a broken arm. The boy was placed on the stand to testify and in so doing it sounded very much as if he were repeating a memorized verse. On cross-examination I suddenly asked him who told him to testify the merry-go-round stopped and threw him off and without thinking, he said, "Mother." This naturally was a break, which won the law suit, but certainly it could not have been anticipated. It could not have been taken into consideration in advance as to the value of the case.

The trial attorney should never write a letter to the Home Office bragging about some cute stunt enacted by him. In the first place, the cute stunt is more impressive to the performer than to any one else. And, in the second place, no insurance company wants such letters in their files. That file may be examined by an official examiner, and many official examiners feel that an insurance company is a trustee of public funds and nothing should be done, notwithstanding the fact that it is perfectly legal, to prevent a claimant from recovering a just verdict. In this same connection many trial attorneys in reporting results of litigation to the home office make light of opposing counsel. The official examiner may feel that the counsel for the insurer won merely because the plaintiff was not properly represented and won when the plaintiff should have had a verdict. In other words, never make it appear that you have won a law suit because of the ignorance of the plaintiff, or of his attorney, but rather, you won because the facts were upon your side.

Remember, that in every piece of litigation the facts have been established, investigation has been made and settlement has been discussed by the claim representatives for the insurer, before the litigation reaches you. In no instance should the trial attorney after an adverse result blame the claim department because of the preparation of the case. This is ony an acknowledgment of your own weakness. After the matter gets into litigation and has been referred to the trial attorney he is supreme, and if he doesn't like the investigation it is his duty to see that the case is reinvestigated and that the witnesses are reinterviewed. It is his responsibility alone, and he must realize that from the time the litigation is started until it is completed. To make such a statement is only a sign of weakness or inefficiency on the part of any trial attorney.

The trial attorney should never forget the insured if he is handling a third party suit. In purchasing a policy of insurance the insurer only agrees to stand in place of the insured and the insured does not therefore become a mere figure head. It is through the cooperation of the insured that most cases are won. The insured must be kept advised as to developments. The trial attorney should be careful to explain to the insured what the law is and why certain moves are made in the defense of the case. He must explain the purpose of those moves. By keeping the insured in mind and by working with him he not only creates a friend for the insurer, but he advances insurance favorably one step further in the minds of the public.

No attempt has been made to discuss the many other "don'ts," many of which you have full knowledge. Some element of fear will always be present. If that were not true you would not be interested in handling the litigation. However, it is true, that if you combine good judgment with industry and the knowledge of how your client operates and what is constantly expected of a trial lawyer, then at no time will it ever be necessary for you to apologize for whatever the result is in a contested piece of litigation. You will have the assurance that under all the facts and circumstances you have done the best you can and, with that knowledge you will know that your employer, the insurer, will have no unfavorable comment to make.

Let us all remember, and I speak to home office counsel and trial attorneys,

that we represent the largest private business in existence. The annual premium income in this country for all types of insurance runs between 8 and 10 billion dollars and those insurance companies have combined assets of over 75 billion dollars. These stupendous sums do not belong to the insurance companies, but they belong to the public and the method of distribution to the public is one of the duties which we perform. It must be remembered that insurance in the general sense affords protection from liability, reimburses us for loss and damage, it assures us a future income and an old age independence, it protects the weak, it provides for the care of children and widows, and it affords opportunity for saving and investments. All of us in the large sense are assistant trustees of these enormous sums and by our conduct we carry forward the banner of insurance. Therefore, let it never be said that any of us have ever been guilty of any conduct which would further lead toward social or government insurance. I doubt if this can ever occur, but we have had such tendencies in the past and they still exist. By our conduct we can assist in insurance education so that there will never be a concerted effort to take from private industry the business of insurance.

Let it be remembered that the necessity for insurance is universal, that the condition of this great business is excellent, that the management and handling of insurance in all of its phases is unsurpassed, and that we, therefore, by our conduct and industry must live up to the trust imposed upon us.

OPEN FORUM

Aviation Insurance Law

STANLEY C. MORRIS, *Chairman*
Charleston, West Virginia

Trial of Aviation Cases

BY FORREST A. BETTS
Los Angeles, Calif.

IN the first place, I wish to take this occasion to express my appreciation to Stanley Morris for the opportunity to again appear on the Aviation Program of this Association. In a field of litigation which is bound to grow voluminously it is gratifying and pleasureable to be considered sufficiently advised to be permitted to discuss the vital problem of trial. Perhaps I should say, as an aside, that it might have been more appropriate for me to have appeared on this program last year, as was originally intended had there been a convention, for at that time the Tenth Circuit Court of Appeals had not yet decided to reverse the case of *Bratt v. Western Air Lines,* an act which makes me feel very much less entitled to be considered an authority.

SCOPE OF THIS ADDRESS

It is not my purpose, in discussing the trial of aviation accident cases, to consider many of the points of substantive law which naturally come to mind. For instance, it is not my purpose to discuss, except incidentally, the question of *res ipsa loquitur.* That subject, in my opinion, is not one which as yet has been settled. The question of its development and application to aviation litigation, is too extensive to be considered concurrently with procedural problems of trial. Advance preparations for trial are, of course, necessarily incident to trial, and have, in and of themselves, some outstanding peculiarities. I believe, likewise, that it will be found that there are certain advantages in the trial of aviation cases, which do not exist in automobile cases or other accident cases. It will be my attempt to point out some of these peculiarities and characteristics.

TYPE OF CASES

Ordinarily, when one speaks of, or thinks of, the trial of airplane accident

cases, one envisions the large and extremely difficult litigation that arises out of the the crash of a modern commercial transport plane, and, in the main, that is the type of case that we are going to consider. However, there are a few cases which have arisen in the past, and undoubtedly will arise in the future, that are interesting—some of them amusing—and which do not involve serious so-called "crash" litigation.

In my previous discussion before this group, I told of the lady who sprained her ankle in the process of sitting down—a rather difficult accomplishment—but one in which she succeeded, to her definite injury. Another case of some interest involved the man who jumped out of the airplane. One can readily realize that this was a very foolish endeavor, and one which should not constitute a foundation upon which to predicate a successful claim for personal injuries. Yes, I said personal injuries, not for wrongful death, for in this case the ultimate injurious results were some compressed fractures of the lumbar vertebrae, which were not fatal. The mystery of this odd result is readily cleared in your minds when I tell you the man only jumped four feet. The plane had been required to land at an alternative field because of fog conditions at Burbank, California, and instead of waiting, as was directed by the pilot, until such time as the emergency steps could be secured, the plaintiff, who apparently had some difficulty in flight because of his sins of the night before, preferred to jump the four remaining feet of his trip. For some reason his feet did not get down first, and the position in which he fell resulted in the injuries which I have described. Perhaps it is needless to say that the result of that litigation was favorable to the defendant. One hardly needs a dissertation upon the trial of aviation cases to successfully try such a factual situation.

That which is true of the trial of a case involving the claim for personal injury or wrongful death, arising out of a crash accident of a common carrier commercial plane, is likewise applicable to litigation arising out of accidents occurring in private plane operation, with the patent exception that the common carrier, like all carriers in that class, is required to exercise the highest degree of care. My discussion, therefore, will be directed to the trial of cases arising out of common carrier transportation.

TRIAL PROBLEMS

At first blush, it is apt to seem to the lawyer who is faced for the first time with the prospect of trying this type of case, that his position is comparatively a hopeless one. It appeals to him that the courts may, without much consideration of the reason for doing so, rule that, since the defendant is a common carrier, the doctrine of *res ipsa loquitur* applies. The barrister is apt then to say to himself that, since all of the employee personnel of the plane is unavailable (which, unfortunately, is usually true), he is not in a position to overcome the presumption or inference whichever it may be. However, such fear may not be well founded, for even though the court submits the case to the jury upon this *doctrine of convenience,* thus relieving the plaintiff of the obligation to prove specific negligence, the case is not entirely lost.

At this point it might be well to say that it is highly questionable whether or not the doctrine of *res ispa loquitur* is correctly applied in the trial of any commercial airline or other air crash case. In the first place, it is difficult to accept the proposition that airplanes do not have accidents in flight even where the highest degree of care is exercised. Likewise, it is difficult to believe that while a plane is in flight its exclusive control is in the employees of the operating company. As was said by the Honorable Judge Tillman Johnson, in commenting on this issue in connection with the motion for new trial in the Western Airline case, "Maybe, when the plane gets in the air, God has some control over its movements." In other words, is it not apparent that we have not yet reached that stage of perfection where a plane will not fall except there be some negligent fault on the part of the operator? After all, man is not a natural birdman, and when something goes wrong while in flight, it should be remembered that the plane "cannot be parked on a cloud." An automobile engine stops; we turn the vehicle and park it at a curb, and no harm is done. A train engine fails; the train stops, and if the brakeman is properly placed out as a protection, there are no harmful results. Even the ship at sea doesn't sink if its motive power ceases.

But if something of a like nature happens to an airplane, there is no control presently possessed by man that can keep it from coming to earth.

As a digression to principal discussion, I suggest again, as I have done in discussion before, that the doctrine of *res ipsa loquitur* is not, or should not be fairly or reasonably applicable to a case involving death or personal injuries arising out of airplane failure. A very excellent discussion of the principles which should apply is to be found in the cases of *Morrison v. Le Tourneau Co.*, 138 Fed. (2d) 339 (3rd Circuit); also in *Gregory v. Herndon*, 81 S.W. (2d) 849; in *Cohn v. United Air Lines Transportation Co.*, 17 Fed. Supp. 865, and in *Wilson v. Colonial Air Transport*, 278 Mass. 420; 180 N.E. 212.

I am not going to attempt to tell you attorneys any step by step procedure of some mysterious character by which you can try or win lawsuits of this type. In that connection, suffice it to say that it is the same old courtroom, the same judge, the same jury, the same personnel, as you may find in any other case. You select the jury the same way; you cross-examine opponent's witnesses with the same approach that you ordinarily use; your trial tactics and mannerisms are set into your individual patterns, and you could not change them if you sought to do so, and most of you are smart enough not to make that effort. Perhaps I should warn you that if you are in the federal courts you had best leave your "sarcastic witticisms" at home. Clothe yourself, at least mentally, in the somber habiliments of the courtroom of 100 years ago; get out the long black coat, the half-moon spectacles, and employ a face stretcher that will make witticisms entirely out of place; then try your case with the spectre of gloom, and a fear of the Court, resting upon your shoulders. If there be a modern trial lawyer, worth his salt, who can try a case in such a mental straight jacket, I will have to resort to the State of my nativity and say to you, "show me." I do not believe lawsuits can be tried without some passages at arms between counsel.

Perhaps the salient differences in the preparation and trial of aviation cases, as distinguished from cases involving the more usual "earthy" accidents, are the extent to which documentary evidence of the operation, inspection, and maintenance of the aircraft may be introduced; the extent to which witnesses are available who have inspected, performed the obligations of maintenance, and flown the airplane; and the extent to which it may be proven that all of these operations are strictly under the almost continuous supervision of the Civil Aeronautics Board and the Civil Aeronautics Authority.

It would serve no good purpose to demonstrate to you the various documents which are provable. They involve such things as the pilot's flight report, which is a record kept of each flight that the plane ever makes, including those which are made for test purposes after overhauling of any major unit. These pilots' reports contain a space which is known as the "squawk" sheet, whereon the pilot comments concerning any malfunction or misfunction of any portion of the plane during any flight. They give an accurate history of any aircraft up to at least the time of the accident itself, and, of course, if there has been no fire, the flight report, or "log," even of the particular trip on which the accident occurs, is available. The pilot and co-pilot are usually required personally to check and chart the weather report from the information given them by the authorities on weather, thus demonstrating that they have a knowledge of the weather conditions which confront them, in so far as that knowledge is humanly available. There are two classes of weather reports ordinarily available: one is the report, regularly received at any air terminal, of the weather forecasts throughout the territory over which the flight is to take place, and the such other forecasts as are important or material to the prognosis of weather conditions which will probably be encountered over a given route at a given time; the other is the report of weather data actually occuring at any given hour. In other words, one of these reports indicates the weather expert's pro jection of his opinion into the future; and the weather data may be used as a comparison to determine whether or not the prognosis was correct. It is somewhat like comparing the preoperative diagnosis of a surgeon with the record made by him during the operation itself. An additional similarity encountered is that the prognosis is not always borne out by the data,

and we have not yet reached that state of perfection when pilots can tell, with absolute certainty, the kind of weather into which they are flying. This reminds me of the comment made by Mr. "Jimmie" James, Vice President in charge of Transportation of Western Air Lines, while testifying in the Salt Lake case. Mr. James, as perhaps you all know, piloted the first flight of airmail from Salt Lake to Los Angeles.

In describing an unexpected air turbulence experience he said:

> "Several years ago I was in a Fokker F-10 and approaching Los Angeles, and it was broad daylight, not a cloud in the sky, and we were only about twenty miles out of the home base, and we had just crossed the mountains; and you usually hit a few bumps there crossing the Sierra Madre Mountains and crossing the Mojave Desert, and we were just relaxed and had eight to ten minutes to go before landing was made and weren't thinking about anything in particular, and all of a sudden some strong force took ahold of that plane and shook it all over the sky, and it was a wooden wing, what we called a wing-covering shingle. It was square sheets of plywood, and about half of those shingles were cracked and about five per cent of them left the aircraft, and we lost some baggage out. The fuselage was made of fabric and metal tubing, and we lost several bags out of the top, and the cabin was just a shambles. The seats were all broken, and several people went up and smashed the hat rack and pushed it up through the top of the airplane. We had several important people on board. Loretta Armor was one. She had a jewel case, about a couple of hundred thousand dollars worth of jewels scattered all over the cabin, * * *
>
> Q. That was under visually perfect conditions?
>
> A. There wasn't a cloud in the sky and absolutely no warning whatsoever.
>
> Q. And you say that, in your knowledge, is an experience that pilots have if they keep flying long enough?
>
> A. I think so."

The importance of this seems apparent—even with weather that seems perfect, into which anyone would fly without hesitation, an invisible power may bring destruction, entirely without negligence.

We are, of course, all familiar with the fact that an accurate record of the passengers is kept. In addition to that an accurate weighing of all baggage is made, and the weight of the baggage and mail, or other such inanimate objects, in the various carrying compartments is likewise weighed and regulated so as to maintain a balance of the center of gravity. It is apparent that such an adjustment is an important element in the flying equilibrium of the aircraft.

In addition to these reports there is an airframe and engine inspection report that is available, showing the inspection which is made at the turn-around point, or at the various check-up hours, beyond which the plane is not permitted to be flown without inspection. The details incident to the records of the engine overhaul are too great to be recounted here. Practically every bolt and nut, every spring and rocker arm, every minute particle of the engine, has a place on the report at which the record of its inspection must be made. The propellers usually have a special record of their own, on which every official check is recorded. The total hours of flight of the individual engines, the hours which they have flown since the last major overhaul, the other details with reference to inspection, the record of the life of the propellers and propeller hubs, the hours since the last major overhaul of the airframes—these are all matters of record, from which it can be demonstrated to a jury that every minor detail of required inspection and maintenance has been taken care of. And when it comes to the matter of demonstrating what has been done in the major overhaul of the airframe itself, details again almost defy the imagination by their multitudinous and meticulous recordation.

You have probably all seen the cockpit of a Douglas or other large commercial airplane, and if you are laymen, you have wondered how on earth the pilot is able to fly the plane and accommodate himself to the necessity of reading all of the gadgets that have to be read and compensated for. Yet the inspection records take each one of these various instruments and indicate the kind of inspection made. The persons who make such records are thereby

strengthened as witnesses when called upon to testify about the work performed.

By the presentation of this enormous volume of documentary evidence proof is strongly made that every move that the airplane company has made in the inspection and maintenance of a plane has more than complied with the requirement that the company exercise the highest degree of care.

In addition to these documents there is also the barograph, which has been widely used by air transport companies. It is an instrument principally devised to graphically outline the flight record of the plane. It shows the elevation of the airfield from which the takeoff is made, and charts the altitude and time of flight, so that it can be determined whether or not the ascension and descension of the plane was in accordance with the flight plan, or was normal as to the manner in which the plane climbed to its flight altitude, and whether or not the descent, likewise, was normal or was out of the ordinary. It is of course apparent that, where this graph is available, it likewise records the descent at the point of crash. This instrument is operated by atmospheric pressure and sudden descents may disturb its correct operation, and sudden jerks may entirely remove the recording needle from the chart. However, it does represent a material element in the establishment of what happened. The instrument likewise records the radio contacts, and, in those commercial planes which still use the automatic pilot, or so-called "iron mike," it records the exact time when this mechanical pilot is or is not in charge of the plane. The radio contacts and the automatic pilot contacts are so graphed that they can definitely be related to the recordation of the flight maneuvers as shown on the rest of the diagram. This graph, of course, is usually available only where the crash has not been followed by fire.

As a passing comment, it is interesting to know that the introduction of these documents has been made less difficult by the statutes adopted in many states for the *admission of business documents in evidence*, as an exception to the hearsay rule. Since most of the cases are transferrable to the federal court because of the diversity of citizenship between plaintiff and defendant, I refer you to the federal act admitting business records as evidence. It is Title 28, Sec. 695 of the U. S. Code, and reads as follows:

> "In any court of the U. S. and in any court established by act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurence or event, shall be admissible as evidence of said act, transaction, occurrence or event, if it shall appear that it was made in the regular course of any business and that it was the regular course of any business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind."

It is improbable, in view of the liberal interpretation which has been given this new exception to the hearsay rule, that there will be any serious question raised concerning the admission of records which are so routinely and accurately kept as those of air transportation companies. Some of the cases of interest which have interpreted the rule to admit documents are:

Hunter v. Derby Goods, Inc., 110 F. (2d) 970.

U. S. v. Mortimer, 118 F. (2d) 266.

Pollack v. Metropolitan Life, 138 F. (2d) 123.

Reed v. Order of U. C. T. of America, 123 F. (2d) 252.

ULM v. Moore, McCormack Lines, 117 F. (2d) 222.

Photographs form another source of documentary evidence that is available in these cases. Pictures are usually taken of the scene of the accident and of the broken plane and the distribution of the parts. This type of evidence is not new, in and of itself, but since the Government usually immediately places a guard around the plane and all areas which may be important in determining what happened, a very accurate demonstration of the physi-

cal facts related to the crash itself is available, and usually these must be extensively relied upon in determining what happened. Also, we all know that photographs truly speak more loudly than words. Evidence of this character is voluminous, and extremely important.

The occasion has undoubtedly come to all of us to be somewhat familiar with the fact that there is a continuous record kept of radio contacts. This is true, whether it be with the company radio, which is in charge in flight, or with the tower radio, which is in charge during the takeoff and landing of any commercial plane at regular terminae.

The personnel in charge of airplanes must be continuously checked for their certification. The pilots are checked by their divisional chief pilots, and sometimes by the chief pilot of the entire system, to ascertain their proficiency in the operation of the plane, for such things as night flying, instrument flying, and routine takeoffs and landings. The type of operation may vary somewhat with the airplane company, but the rules of any good commercial company are all on the extremely conservative side. The airplane must pass a test under governmental supervision, before it is issued its airworthiness certificate. It may not be common knowledge that this airworthiness certificate, which must be issued once a year by the Government, can only be issued after the plane has passed the tests imposed by the inspector on behalf of the Civil Aeronautics Authority. Engines must undergo what is known as a 25 hour, a 75 hour, and a 125 hour checkup, the record of which must appear on the flight logs above referred to, and these check-ups must be in accordance with Civil Aeronautics Authority regulations. In addition it is usually provable that the airline involved makes what is known as a "Number One," "25 hour" or "turnaround" inspection, at each port at which the plane terminates one flight and is turned around to begin its return course, and this is true, even though the requisite 25 hours have not been flown. The engines must be torn down and inspected when they have been flown a certain specified number of hours, and all worn portions must be replaced and the engines thoroughly rebuilt. After such reconditioning the plane may not be again flown in commercial service until a test flight has been made.

For the major airframe inspections there are special tools permitting the inspector to look at the supporting struts and other parts within the wings. Some of these tools may be likened to the dental mirror. Long arms permit the aviation inspector to reach into the recesses of the plane structure, and to magnify each portion so as to be sure that no fault has developed. It is also significant that these inspectors do not themselves do the repair work, even where the inspection is made by the company. The check of what is to be done is made by one person, and the plane may not be again flown until the records show that the maintenance crew has complied with the inspector's demands. The airframe must be practically torn apart when it has been flown a given number of hours, and in such tear-down the wings must be taken off, the inside of the fusilage must be removed, and every cable must be inspected. In DC-3 equipment this inspection must be made at approximately 7,000 hours. There is a similar but not quite so extensive general inspection which must be made at 3,500 hours.

It is probable that I could go on considerably more extensively on this matter of documentary evidence, but it is not needed to indicate to you the extent to which the plane's life history—one could say its every "breath"—can be chartered to the court and jury to demonstrate that the company has done everything within its power and control to exercise that degree of care which is required of it to protect its personnel and its passengers in flight. In this connection it can be demonstrated that almost every step in the life of a plane, in its inspection and maintenance—everything, in fact, except its actual flight—is taken hand in hand in the presence of an inspector acting on behalf of the Civil Aeronautics Authority. It can even be shown that in flight the representatives of the Government may present themselves at any time to check the operation to be sure that it is in accordance with the rules promulgated by the regulatory bodies.

To a like extent it can be shown that every person who has any authority to pass on the airworthiness of the plane must be properly certificated. The Civil

Aeronautics Authority issues a certificate to one qualified to inspect the airframe, and this is called an "A" or Airframe Certificate. It likewise issues an "E" or Engine Certificate to a mechanic qualified to make repairs on airplane engines. Radio certificates are required to be issued by the Federal Communications Commission. The man who may interpret the weather reports, must be qualified, and must have passed an examination to prove those qualifications. These certificates are not secured by merely "reading and studying" the theories of flight, or the principles of internal combustion, or whatever engine power or airframe problem may be considered. They are issued only after tests given by the Authority have been passed by the applicant. The Civil Aeronautics Authority assures itself and the public that the men who inspect airplanes are not mere amateurs or guessers, but are men who have established their qualifications and are capable of exercising that highest degree of care which every common carrier by air in this country sponsors to the utmost. I believe that a legitimate and telling question of every one of these witnesses who may be called to prove the inspection or maintenance records, is to ask whether or not such witness, in reliance upon his certification to the airworthiness of his particular field, would have been willing to have risked his life in flight in the particular plane involved, at the time he placed his signature to the record.

In addition to these experts, there is always the field of what might be called the *"profession" experts,* who are available when needed. The airframe companies and the engine companies, the various people who are producing airplanes today, or producing parts for airplanes, have not resorted to conjecture or guesswork in the production of the finished equipment; the airplane today is not a mere kite; it is the product of doctors of aerodynamics; and insofar as there may be the necessity for them as witnesses, there are available, not only to the defendant but as well to the plaintiff, men of fine education and vast experience, to aid in determining whether there have been or have not been failures, either of the airframe or of the engine, or of any other part. It is not necessary to rest one's case, on either side, on half baked and unprepared witnesses, on the theory that better witnesses are not available. Better witnesses may not be helpful, and, for that reason some parties, plaintiffs particularly, we think, may find it best to plead that they are unavailable or unobtainable, but neither of such excuses may be taken in good faith.

Although most airplane accidents do not have the advantage—or is it a disadvantage —of eye witnesses, who are able to describe what happens, we are most fortunate in having immediate and complete government control of the crashed plane and the area where the accident occurs. Thus we are able to establish, without controversy, the physical facts which are so essential to the determination of any litigation involving the claim for personal injuries or death having been caused by negligence. The advantage of the immediate investigation of the federal authorities in control of aviation is one that cannot be over estimated. Every particle of available evidence is given us, and that information is as available to one side as it is to the other.

I cannot close this discussion without commenting upon the high quality of the witnesses whom you will find appearing on your behalf. Not only does this apply to the inspectors and personnel of the United States Government authorities, but likewise to the personnel of the airlines themselves. You will find them to be intelligent, cooperative gentlemen, of the type that any trial lawyer would usually "give a lot" to have in his case. The very grade of their integrity and sincerity will be a definite aid to your defense.

I have suggested in the past that the key to the preparation and trial of an aviation case is work, hard work. I reiterate that proposition. The research through the records, the history of the plane which has been in the air for some thousands of hours, the minute details that are involved in even a 125 hour inspection, the voluminous records of the 3,500 hour overhaul, and the even greater detail of the 7,000 overhaul and rebuild, the marshalling of the various pilots who have flown a given plane, to prove its past airworthiness, the taking of the depositions of experts gathered together at the point of the accident, but who are widely dispersed at the time of trial; the proper and orderly presentation of these matters to court, you, as attorneys closely connected with the trial

of negligence litigation, will recognize as involving enormous expenditures of time and energy. But I assure you that as the litigation in this field becomes more widespread, and you have the opportunity to face these problems for yourselves, you will find that you have had new, interesting and enjoyable experience in the preparation of litigation dependent almost entirely upon indirect evidence for the establishment of causation.

In conclusion, I reiterate the proposition that the doctrine of *res ipsa loquitur* should not apply. Every element of preparation and trial which has been my experience, and which I have here attempted to outline, seems to justify the conclusion that, insofar as the flight of the plane itself is concerned, unless the crew survives, plaintiffs have knowledge of every fact of which defendant has knowledge, and plaintiff has access to every document and record to which defendant has access. Under such circumstances, that rule of convenience which was fastened upon land based commercial carriers should not be carried over into the trial of airplane cases. It is my belief that where the airplane company can prove that it has done everything required of it under the regulations of the federal authorities; has made every inspection; has provided every safeguard; has furnished experienced and capable personnel; and has done no wrong thing in flight, the doctrine of *res ipsa loquitur* should be rejected as a matter of law.

I trust that in your aviation litigation you will have the enjoyment that comes to every trial lawyer in successfully invading a novel field.

* * *

DISCUSSION BY GEORGE W. ORR
New York City

IT IS a great pleasure to appear before this body, before any body of lawyers, who are interesting themselves in aviation because, like our Chairman, I think that while aviation is much smaller now than many of us realize, it is because of the extensive war activities, it has a tremendous and assured future which is bound to bring us all within the compass as it grows and we as a nation and we as a world will become more air-minded.

This paper that "Red" has just presented to us has been excellent, just as his work as a trial lawyer has been outstanding. It is difficult to follow the paper to discuss it. He leaves me very few avenues of approach; however, I think that with the splendid outlining of the details that is available in the defense of an aviation case, I might try to be an interpreter as between the aviation underwriter and their home office lawyer and the trial lawyer that we use out in the field.

As I have said, Mr. Betts has done a swell job in his paper. And in the trial which he has conducted in our behalf, I think he makes a number one example of just what I have in mind and that is a practical interpretation between the home office man who is responsible, finally, for the results of these law trials and the trial man in the field.

I go back to our meeting two years ago at the Edgewater Beach Hotel. In that instance our positions were exactly changed —I delivered the paper and "Red" was to follow me. When he got up to follow me, after being as courteous as he dared or felt that he could be, he said, "The objection to this fellow George Orr is that he is a needler. He needles the attorneys in the field." So my hope today, in retaliation, is to plead guilty, we do needle. You do not have to needle that same attorney in a railroad or automobile case. After we referred a particular case to "Red," I asked that he give us his recommendations after reading the transcript of the record. "Red," in his busy way, read it and applied civilian understanding of aviation nomenclature. He had come to what I considered a completely instant conclusion as to the liabilities in the case and everything else, and I told him so, which is why I am a needler.

The lesson that I want to draw from this is this, and I have had it time and time again because I have used the good service of trial lawyers not only all over America but all over the world, and I am confronted with this proposition—to each new case that you refer to a lawyer, no matter how good he is, and the better he is the harder it is, he has to be orientated to the problem that he must face and that we must face.

Most of the men we have in a meeting of this kind are outstanding trial men.

We want that kind of trial lawyer. We are making new law. We are using old principles, but we are adapting them to a new form of transportation and a new form of life. Let this be done judiciously and carefully as it is of utmost importance to this future industry which we all visualize.

When the trial lawyer gets a railroad or automobile case, he is accustomed to the law involved and he is accustomed to the type of witness he will cross-examine. He is so accustomed to the type of documentary evidence that he will present that he has to do hardly more than open a well-prepared case to be able to make a good presentation and to bring out his witnesses. That is not true with aviation because you have a different element involved. Mr. Betts read off several pages about the documentary evidence that you are able to produce in conveying to the court and jury, the really remarkable and meticulous care used by the air operators in the exercise of their obligations to the passengers. I will tell you now that no trial lawyer, who has not had to do what "Red" has had to do, is capable of presenting that evidence until he orientates himself to the problem of trying an aviation case. It takes more work and it takes more time. You have got to understand some of the problems from a practical standpoint, of what it means to say that the plane used is the highest type of plane obtainable, that the inspection is 25 hours and 75 hours, that overhaul inspection has been properly attended to, that the crew is properly qualified for the job, that dispatching was properly done and without negligence. You have got to go and talk to those witnesses and learn enough of the background of what they are going to say to bring out from them the points which you are going to make.

I have sat in the utmost discomfort when we had a trial lawyer who did not understand this background and who would bring out day after day of testimony because I had written down the defense for him. He had just what he was supposed to bring out in meteorology, in dispatching, etc., but he spent day after day bringing out the technical details without the slightest comprehension of coming to a conclusion at the end. You have to know what you are doing to do that, and it is very simple. You have got to go and talk to the witnesses more so than in your general practice. You have got to let them know what you are going to try to prove so that they will know what to answer, without fear of sticking their neck out where they are not supposed to. They can freely and truly answer the questions you are going to ask if they know what you are driving at. You have got to be able to understand their language enough to be able to ask it in a way that they will understand and get the information that you want. I don't care how good a trial man you are, you have got to go through that period when you undertake an aviation case. After you have done that, you can then present a case as Betts did, in a way that I thought was flawless. And the results were that he won it. As I said, the circuit court sort of upset his apple cart for him, but that was beyond his control. He presented his case in such a way that the court and jury understood. You must understand that they are just as unfamiliar with this field as you are. If you have gone through the period of familiarizing yourself with the nomenclature of aviation, then you are able to get that over to the jury in a natural way so that they can grasp the points that you are trying to make. When you are able to do that, you will find in aviation cases one of the most interesting and challenging types of practice. You will find that you have a sympathy and understanding, that your defenses are taken with better grace by a court and a jury in an aviation case than in any type of case with which I am familiar because most people are interested in aviation. That may not be true twenty-five years hence, but it is true now.

For instance, your defense of assumption of risk you put in as a matter of course, but in aviation you can make that a very real thing. You can make a tremendous impression and get a sympathetic understanding where it would be practically valueless in other types of litigation.

I don't want to go on and on. I think if I call attention to one or two things that I found with peculiar interest in aviation claims, it may be worth while to take that additional time. For some unknown reason a person who is killed in an airplane accident is supposed to be much more valuable than a person who is bumped in

the lumbar region by a Ford; there the plaintiff demands $20,000 or $25,000, outside of limited estates, for an ordinary accident, he will want a $100,000.

I am talking now in airlines because the other death claim rate is even lower, the average airline death claim runs about $10,000 and that goes clear back to the first time where there were airplanes. They don't pay $100,000. The largest death claim that I have paid in my years of work has been $32,500. That does not mean injuries. There have been a few larger injury claims, two that I can recall. We have several cases in our New York courts under the Warsaw Convention which we will hear more about later on this afternoon in which liability is restricted to $8,300, or roughly that.

We have a series of cases, and each lawyer tried to outdo himself in the matter of claims. One put in for $200,000; one thought he was a piker so he put in for $500,000; and the next one $1,000,000; and still the next one, $1,100,000. It is really ridiculous when they are, as far as we can learn from the decisions of our courts, all confined to the limitation of the $8,300 of the Warsaw Convention. That has been one of the things that I have noticed, the demands start out higher.

The second is that there seems to be the curious notion that if you prevail upon a court to submit the case on the doctrine res ipsa loquitur, that that is all that has to be done—you have got the case. As a matter of fact, I recall that of the few cases that have had to go to litigation, res ipsa loquitur has not been denied in them. In the case Betts won, res ipsa loquitur was permitted and the jury was instructed that the doctrine applied, although Les Johnson was of the opinion that it was improperly applicable, but it was submitted. The case was won and the reason is that when you go to the court and jury on the presumption that your defense angle is wide open, you can start in with a perfect picture of meticulous care. The effect of that is that the court and jury get the impression that the highest degree of care has been exercised beyond a scope that they ever realized was possible on the part of any one who carried passengers for hire.

Gentlemen, those are the things which occur to me as practical in line with the very excellent address we have had from Mr. Betts. Later on, if there is opportunity, I know that any of us who have had the privilege of having had some experience in this line will be glad to enter into any discussion on any particular point which you may have in mind.

A Review of Recent Aviation Accident Decisions

By Charles S. Rhyne
Washington, D. C.

I INTRODUCTORY

EVERYONE agrees that Civil Aviation is due for unprecedented post-war expansion because of the great wartime aviation advances. As thousands of airplanes fill the air, it is a certainty that aviation accidents will increase in proportion to this general increase in Civil Aviation. Liabilities for damage claims growing out of these aircraft accidents are among the most difficult of all legal problems since, in the present state of the law, they must be solved by applying some of the oldest legal rules of the common law to our newest mode of transportation.[1] These common law rules were developed chiefly for surface transportation, so they do not fit air transportation with any real degree of satisfaction to either those claiming damages in aviation accidents or to those against whom these claims are made. This situation has been the subject of much comment and much study by those interested in the future of Civil Aviation.

All kinds of ideas have been advanced with the object of freeing Civil Aviation from the uncertainties created by the existing legal rules of civil liability. These include compulsory insurance,[2] uniform state liability legislation,[3] Federal liability legislation,[4] and the formation of a mutual cooperative association by air transport companies to standardize the liabilities of these companies.[5] This subject has been given most thorough consideration by the the American Bar Association,[6] State aviation officials,[7] the Air Transport Association, the National Conference of Commissioners on Uniform State Laws,[8] the Civil Aeronautics Board,[9] and the State Department through its participation in international conferences.[10] These various groups suspended their activities in this field during the war period, but they will undoubtedly begin further work on this subject as one of their most important post-war projects. This is certainly a most timely subject for present consideration.

I have been advised that this paper for the International Association of Insurance Counsel should cover some of the recent decisions of the courts involving aviation accidents with special emphasis on problems which are of concern to insurance counsel. I have also been informed that this paper will be used to introduce an open forum on aviation accidents and insurance law. With the foregoing understanding of the purposes of the paper, the most recent cases have been collected herein in separate sections devoted to the particular subjects discussed in those cases. No attempt has been made to completely cover the field of aviation tort liability, but the recent cases which are discussed in this paper have been annotated with some of the earlier cases which have considered the same legal questions to demonstrate that the courts have changed many of their views with respect to exclusion clauses in insurance policies which except various aviation activities from coverage.

It is hoped that this paper will serve its purpose by presenting questions which

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[1] Wherry, *Aeronautics and the Problem of Tort Liability* (1939), 10 Air Law Rev. 337.

[2] Ball, *Compulsory Aviation Insurance* (1936), 7 J. Air Law 54; O'Ryan, *Limitation of Aircraft Liability* (1932) 3 Air Law Rev. 27.

[3] Knauth, *The Uniform State Aeronautics Liability Act* (1938), 9 Air Law Rev. 352. In opposition to this proposed act see Davis, *Comments on the Proposed Uniform Aviation Liability Act* (1938) 9 Air Law Rev. 359, and Davis, *The Uniform State Aeronautical Code* (1937) 8 Air Law Rev. 282. Also see the very careful analysis of the proposed uniform law in Godehn et al, *Proposed Law of Airflight* (1937) 8 Air Law Rev. 505 (1938) 9 J. Air Law 132.

[4] Sweeney, *Report of the Civil Aeronautics Board of a Study of Proposed Aviation Liability Legistion* (1941); Fike, *The Problem of Interstate Air Commerce Casualties* (1938), 9 Air Law Rev. 250. See H. R. 531, H. R. 532, H. R. 4912 and S. 1904, 79th Congress, 1st Session.

[5] See *infra* on "Aviation Accidents in International Air Transportation."

[6] *Report of the Standing Committee on Aeronautical Law*, 67 A.B.A.R. 186 (1942).

[7] *Report on the Proposed Uniform Aeronautical Code* (1938), 9 J. Air Law 679.

[8] Schander, *Uniform Aviation Liability Act* (1938), 9 J. Air Law 664.

[9] See Sweeney, *supra* note 4.

[10] See *infra* on "Aviation Accidents in International Air Transportation."

the Forum will find of interest and value in its discussion of current legal problems in this field. The writer of this paper is fully aware of the many legal problems created by aviation accidents which a paper of this kind cannot cover within reasonable space limitations and it is hoped that the Forum discussion will be able to consider many of these which are not mentioned herein. I wish that your meeting were being held at a later date because we have in process of preparation in my office a small monograph which collects and analyzes all reported court decisions involving aviation accidents, and I would like to be able to hand each of you a copy of that completed study. For quite a number of years we have been working on cases and legislation involving aviation accident liabilities and recently it was decided that we would compile all of our accumulated information into a small volume to be titled "Aviation Accidents and the Law." As indicative of the scope of this soon to be published work, and in the hope of stimulating discussion on some of the problems which could not be covered herein, I am attaching to this paper the "Table of Contents" of the original manuscript of "Aviation Accidents and the Law."

II. INSURANCE AND AVIATION ACCIDENTS INVOLVING WAR SERVICE

Of real current interest are the recent decisions involving claims for death in aviation accidents which occur while an Insured is in war service. The few cases which have reached the courts are undoubtedly just a sample of things to come.

The most recent reported court decision is that in the *King*[11] case where the United States District Court, Western District of South Carolina, on May 25, 1946, held that a Second Lieutenant in the Civil Air Patrol, who was drowned in the Atlantic Ocean about thirty miles from the coast when his plane developed motor trouble and made a forced landing, did not die as a result of participation in aviation or aeronautics. The insured was flying a land based plane on a routine coastal patrol flight at the time the motor trouble developed. He was accompanied by a second plane, the occupants of which saw the insured's plane land and sink four minutes later. The pilot of this second plane radioed for help and then watched the insured and his companion floating in the water with inflated life jackets on for more than two hours. The drowning took place before a Navy boat arrived to pick up the Insured. The beneficiary sued to recover under a provision of the insurance contract providing for the payment of $5,000 in the event of death effected solely through external, violent and accidental means. The defendant, a fraternal benefit association, denied liability and relied on a clause in the insurance contract which excluded coverage of death "resulting from participation, as a passenger or otherwise, in aviation or aeronautics (except as a fare-paying passenger in a licensed aircraft operated on a regular schedule.)" The Court stated that it had adopted the rule as to exclusion clauses in aviation accident policies that "liability is to be determined by the cause of death, and not by circumstances or status of the insured." The Court then said in part:

> "In the instant case, Lieutenant King arrived by way of aircraft at the place near where he was later accidentally drowned, but he was not injured in the arrival or in leaving the plane which had brought him there. He left the plane uninjured and wearing an inflated life jacket. The plane had not crashed, but had landed on the water in a normal landing attitude and sank within a few minutes after its landing. Service, travel, flight and participation in aviation had come to an end without injury to Lieutenant King. . . . I find that disengagement from participation in aviation or aeronautics had taken place, and under the facts, and applicable law in this case, it cannot be said that Lieutenant King's death resulted from participation, as a passenger or otherwise, in aviation or aeronautics. Where the service, travel and flight in the aircraft had definitely ended, and the only connection the insured had with the plane at the time he met his death by drowning, was that he had arrived by plane at a place near where he was drowned, his death was

[11] *King v. The Order of United Commercial Travelers of America*, 235 C.C.H. § 554 (U.S.D.C. W.D.S.C. May 25, 1946).

too remote to be considered the *result* of participation in aviation or aeronautics."

The court in this case goes to considerable length to approve the *Bull* case, which is referred to later on in this summary of recent cases. The facts and the decision in the *Bull* case are similar to the instant case.

Another very recent decision is that of the Louisiana Supreme Court on November 5, 1945, in the *Quinones*[12] case where the insured, a doctor and a member of the Medical Corps of the United States Army, was killed when the military plane in which he was riding crashed into a mountainside. His policy contained both an aviation exclusion clause and a military, naval and air service clause, each of which was set up by the insurance company as an alternative defense for a denial of liability.

The aviation clause provided that:

"Should the death of the Insured result from operating, or riding in, any kind of aircraft, except as a fare-paying passenger in a licensed passenger aircraft operated by a licensed pilot on a regular passenger route between definitely established airports, only the reserve under this Policy shall be payable and said reserve shall be in full settlement of all claims hereunder."

The Court held that at the time of his death the insured was a passenger on a plane regularly operated by the United States Government on a scheduled flight between definitely established airports, that the plane and pilot had been properly licensed by the Army and that the insured was a fare-paying passenger to whom the Army supplied transportation in this instance free, but for whom it would have paid transportation, if necessary, on some other carrier.

The military, naval and air service exclusion clause provided as follows:

"The liability of the Company shall be limited to the reserve on this policy, or to one-fifth of the amount payable hereunder on the death of the Insured, whichever is the greater, if the Insured should die while enrolled in military, naval or air service in time of war, whether declared or undeclared; or if the Insured should die as the direct or indirect result of such service, without securing a permit signed by an executive officer of the Company and paying such extra premium as the Company may fix to cover the hazard. Any indebtedness on or secured by this Policy, shall be deducted from the amount otherwise payable."

In rejecting the defense based upon this clause the Court held that since the Company had issued the policy with full knowledge of the military status of the insured, it had waived any defense based upon this clause. The application for the policy specifically stated that the insured was then serving as a lieutenant in the Medical Corps of the United States Army and at the time the policy was issued the United States was at war with Germany and Japan.

This case is to be compared with the *Hyfer*[13] case where the Supreme Judicial Court of Massachusetts arrived at a different conclusion. In the *Hyfer* case, insured enlisted in the Army and was assigned to the Air Corps as a private. While serving as a radio operator on an Army transport plane he was killed on October 1, 1942, when the plane crashed into a hill in Puerto Rico. The insurance policy did not have a war risk rider but did include a special aviation rider providing: "Death as a result, directly or indirectly, of travel or flight in any species of air craft, except as a fare-paying passenger on a licensed air craft piloted by a licensed passenger pilot on a scheduled passenger air service regularly offered between specified airports, is a risk not assumed by this Policy; but, if the Insured shall die as a result, directly or indirectly, of such travel or flight, the Company will pay to the beneficiary the reserve on this Policy, less any indebtedness thereon." The Court in limiting its judgment to the amount of the reserve said in part: "The main question is the effect of the aeronautical clause. If it applies, there can be no recovery of the face amount of the policy, as the insured was not 'a fare-paying passenger on a licen-

[12] *Quinones v. Life and Casualty Company*, ... La. ....., 24 So. (2d) 270; 1946 U.S.Av.R. 1 (1945).

[13] *Hyfer v. Metropolitan Life Insurance Co.*, ... Mass. ....., 61 N.E. (2d) 3, 1945 U.S.Av.R. 93 (1945).

sed air craft . . . on a scheduled passenger air service regularly offered between specified airports'. One reason urged by the plaintiff why it should not apply is that, since there was no general provision excluding an obligation to pay for death due to war risks, the aeronautical clause must be interpreted as not precluding payment for death occasioned by aircraft flight in the armed services. This, however, is in direct conflict with its express language. The absence of a provision excluding death due to war risks did not operate to engraft an implied exception upon the unambiguous aeronautical clause, which relates to the risk itself and not to the reason for the exposure."

In March, 1945, the United States Circuit Court of Appeals, Seventh Circuit, held in the *Bull*[14] case that liability for the death of a naval aviation officer who was killed by Japanese machine gun fire while attempting to launch a life raft from a disabled plane was covered by an insurance policy which excluded from coverage "death as a result, directly or indirectly, of service travel or flight in any species of aircraft." The Court held that death was caused not by aviation but by "war risk" since the flight in a seaplane had ended before he was killed.

The United States Circuit Court of Appeals for the First Circuit has held in the *Green*[15] case that the death of a naval cadet who made a controlled forced landing on the water while attempting to land on the U.S.S. Wolverene when he was caught by a sudden snow storm, was not covered by an insurance policy which contained the clause "death occurring by reason of any aerial flight is not a risk assumed by the company except as to the extent of the reserve." The medical report showed that "death occurred from drowning and exposure." The Court held that death of the cadet was caused "by reason of an aerial flight."

In the *Barringer*[16] case, a Major in the United States Army, a glider expert, boarded an army plane, a C-47, in Puerto Rico on January 24, 1943 for a flight to Trinidad. The plane took off and headed out over the ocean and neither the Major nor any occupant of the plane has been heard from since. Suit was brought to recover on an insurance policy issued upon the life of the Major and the Insurance Company offered as a defense an "aviation rider" on the policy which provided that if the insured's death "shall have resulted from operating or riding in any kind of aircraft . . . the liability of the Company under this policy shall be limited to the net reserve. . . " The Court held that "insured is dead" and "it is not only permissible but reasonable and logical to conclude that he met his death as a result of riding in the airplane," so judgment was allowed only for the "net reserve" on the policy.

In the *Schifter*[17] case, the insured's policy excluded accidents while in military service in time of war or "while he is making or taking an aerial flight of any kind except as a passenger holding a ticket or pass in a licensed commercial aircraft provided by an incorporated common carrier legally and actually operated by a licensed transport pilot upon a regular route pursuant to a published schedule to transport passengers from one airport to other airports on said route." A rider providing that the policy would cover insured even though he changed to a more hazardous occupation, or entered the armed forces, so long as insured remained in the United States. Insured entered the Army and died in 1943 from injuries received while riding in an Army plane in the United States which crashed in the course of his military training. Insured did not leave the United States at any time. The Court allowed recovery for the full amount of the policy as the rider stating that the policy covers insured while in military service while located in the United States supersedes the aviation exclusion rider quoted above.

The Prudential Insurance Company has been involved in four reported court decisions which are of interest here since they construe an exception against death "from having engaged in aviation or submarine operations or in military or naval services

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[14] *Bull v. Sun Life Assurance Co. of Canada*, 141 Fed. (2d) 456, 1944 U.S.Av.R. 47 (U.S.C.C.A. 7th, 1944).

[15] *Green v. Mutual Benefit Life Insurance Company*, 144 Fed. (2d) 55, 1944 U.S.Av.R. 48 (U.S. C.C.A. 1st, 1944).

[16] *Barringer v. Prudential Insurance Company*, ... F. Supp. ....., 1945 U.S.Av.R. 89 (U.S.D.C. Pa. 1945).

[17] *Schifter v. Commercial Travelers Mutual Accident Assn.*, 183 Misc. 74, 50 N.Y.S. (2d) 376, 1945 U.S.Av.R. 84 (N. Y. Sup. Ct. 1944).

in time of war."[18] These cases all arose in peacetime and the courts have arrived at different constructions of the language of the exception.

In the *Peters*[19] case, the New York Supreme Court in 1929 held that the above quoted phrase does not except death from aviation in time of peace so the death of an insured passenger in an airplane was covered by the policy. The Court also said that the expression "engaged in aviation" is ambiguous so must be construed against the insurer but that "it gives the impression of participation as an occupation" rather than an occasional participation.

In the *Price*[20] case, the Florida Supreme Court in 1930 stated that an allegation that insured "was in a certain airplane" when he met his death does not show that ". . . insured was 'engaged' in aviation operations," for although the insured was piloting the plane the pleadings upon which the Court based its decision did not show this fact. The Court held that: "The use of the words 'or in' to join the two phrases describing materially different hazards, indicates that the two phrases do not and were not intended to express a single or continuing thought, and that the qualifying phrase 'in time of war'; was intended to refer to the next preceding phrase 'Military or naval service' and not to the more remote phrase 'aviation or submarine operations'." This Court in disagreeing with the *Peters* case said: ". . . there is no real ambiguity requiring a construction against the insurer. . . ."

The Supreme Court of Wisconsin in the *Charette*[21] case, decided in 1930 but after the *Price* case, held that the clause is ambiguous so must be construed against the insurance company. This case, like the *Price* case, involved a pilot, while the *Peters* case, as stated above, involved a passenger. The *Taylor*[22] case, decided by the New York Supreme Court in 1931, then held that the pilot of an airplane was "engaged in aviation" within the clause quoted above so the beneficiary of his insurance policy could not recover when he was killed in a crash of the airplane.

The decision in the *Compton*[23] case arose out of World War I involving a provision of the by-laws of the Woodmen of the World excluding "those employed in any department of ammunition factories where explosive compounds are made or handled, balloonists, aviators, aeronauts, aeroplanists . . . ." unless "such employees, shall, within thirty days after engaging in such prohibitive occupations, notify the clerk of his camp in writing of such change of occupation and thereafter, while so engaged, pay an additional sum of fifty cents on each monthly installment of each $1,000 of his beneficiary certificate. . . ." On December 1, 1918, insured was drafted into the army, assigned to the aviation section and killed while flying. The Court concludes as follows: "The principal contention of the defendant is that the insured came within the provisions of Section 42 of the constitution as amended at the 12th biennial session of the order at Atlanta, Ga., in July, 1917, and that the policy became null and void because the insured did not, within 30 days after entering the aviation branch of the United States Army, notify the clerk of his camp in writing of his change in occupation and thereafter pay an additional sum of 50 cents monthly. We cannot agree with counsel for the defendant in this contention. We do not think that Section 42, referred to, relates to those in the army and navy of the United States. The section, by its terms, refers to persons engaged in private occupations and the aviators, aeroplanists, etc., mentioned in the section referred to, are persons engaged in the aviation branch either of the army or the navy of the United States. No reference is made to the army or navy of the United States in that section. The language is directed solely to persons engaged in private occupations. This construction in made manifest when we consider it in connection with section 43. When the company decided to deal with men in the army and navy of the

[18] *Peters v. Prudential Insurance Company*, 133 Misc. 780, 283 N. Y. Supp. 500, 1929 U.S.Av.R. 67 (1929); *Taylor v. Prudential Insurance Company*, 1931 U.S.Av.R. 41 (N. Y. Sup. Ct., 1931); *Charette v. Prudential Insurance Company*, 202 Wis. 470, 232 N.W. 848, 1931 U.S.Av.R. 48 (1930); *Price v. Prudential Insurance Company*, 98 Fla. 1044, 124 So. 817, 1930 U.S.Av.R. 118 (1929).

[19] Ibid.

[20] Id.

[21] *Supra* note 18.

[22] *Supra* note 18.

[23] *Woodmen of the World v. Compton*, 140 Ark. 313, 215 S.W. 672, 1928, U.S.Av.R. 145 (1919).

United States, it mentioned them in specific terms and spoke of them as enlisted men in the army or navy in defense of the United States. Hence we think the circuit court was correct in holding that the insured did not come within the provision of section 42 of the constitution of the order copied in our statement of facts."

III. AMBIGUITY OF LANGUAGE USED IN AVIATION EXCLUSION CLAUSES AS REASON FOR CONSTRUCTION AGAINST INSURANCE COMPANY

In many cases involving aviation exclusion clauses of insurance policies a claim has been made by the beneficiary or insured that the particular clause is ambiguous. In such cases the claimants seek to invoke the well-established rule resolving all doubt as to exception of the particular risk by the aviation exclusion clause against the writer of the insurance contract, the insurance company.[24]

The most recent decision on this subject was handed down on July 22, 1946, by the United States Court of Appeals for the District of Columbia in a case involving the death of the famous newspaper correspondent, Raymond L. Clapper.[25] In that case Clapper's widow and beneficiary brought suit against the Aetna Life Insurance Company to recover the additional $5,000 provided for in an insurance policy in the event of the insured's accidental death. The insurance company paid the face amount of the policy but denied liability for the additional amount on the ground that it was exempt from liability for the accidental death of the insured by a provision of the policy that the provision with respect to accidental death did not apply "if the death of the insured occurs . . . from an aeronautic flight." Clapper died as a result of the mid-air collision of another plane with the naval air transport plane in which he was riding as a guest, in the vicinity of the Marshall Islands. In reaching a conclusion that the quoted "phrase is so ambiguous as to compel a decision in the favor of the insured," the Court referred to a concession by counsel for the insurance company that if the language of the clause had referred to "participating" or "engaging in" an aeronautic flight, the company would be liable. The Court referred to the various court decisions in which courts had held in conformity with this concession and agreed with the contention of the beneficiary that the particular clause is a term of art implying an occupational or experimental position with regard to the particular flight rather than a reference to a mere passenger on board a plane.

This case is merely one of quite a number of recent decisions in which the courts have given an interpretation of aviation exclusion clauses of various types which allowed recovery where the slightest ambiguity could be found. It will be recalled that when aviation exclusion clauses first came before the courts they were uniformly held to relieve the insurer of liability whenever they excluded coverage for injury or death from "participating in aeronautics or aviation."[26] This was true in the beginning even with respect to mere passengers in airplanes.[27] There was then a change in judicial construction so that this clause was given an occupational connotation and applied so as to allow recovery for injury or death of mere passengers and merely exclude pilots and those actually directing or otherwise participating in airplane flights.[28] In the cases

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[24]See for example: *Aschenbrenner v. United States Fidelity and Guaranty Co.*, 292 U. S. 80, 84-5, 54 Sup. Ct. 861, 78 L. Ed. 1474 (1933): "The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training, and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted."

[25]*Clapper v. Aetna Life Insurance Company*, ... Fed. (2d) ....

[26]*Bew v. Travelers Insurance Company*, 92 N.J. Law 533, 112 Atl. 859, 14 A.L.R. 983, 1928 U.S.Av.R. 151 (1921); *Travelers Insurance Company v. Peake*, 82 Fla. 128, 89 So. 418, 1929 U.S.Av.R. 156 (1921); *Meredith v. Business Men's Accident Association*, 213 Mo. App. 683, 252 S.W. 976, 1928 U.S.Av.R. 159 (1923).

[27]Each of the cases cited *ibid.* involved passengers.

[28]Many cases could be cited, but see for example: *Martin v. Mutual Life Insurance Company*, 189 Ark. 291, 71 S.W. (2d) 694, 1934 U.S.Av.R. 73 (1934); *Gregory v. Mutual Life Insurance Company*, 78 Fed. (2d) 522, 235 C.C.H. §505, 1935 U.S.Av.R. 53 (U.S.C.C.A. 8th, 1935). Cert. Den. 296 U.S. 635 56 Sup. Ct. 157, 80 L. Ed. 451 (1935); *Chappell v. Commercial Guaranty Insurance Co.*,

involving the exclusion of injury or death while "engaging in aeronautics" even the earliest cases held that passengers in an airplane were not within the phrase.[29] Some insurance companies then added the word "operations" to "participating" or "engaging," but the courts held that the addition of "operation" did not cover passengers.[30] The insurance companies then added to "engaging" or "participating" the phrase "As a passenger or otherwise." The courts at first held that the addition of "as a passenger or otherwise" clearly excluded liability under an insurance policy for the death of a passenger who was killed in an airplane accident,[31] but recent cases have now given an occupational connotation to this exclusion clause and have held that a mere passenger on a regularly scheduled flight over an established air route is not within the meaning of the exclusion clause "participating in aeronautics or aviation as a passenger or otherwise."[32] The next part of this paper discusses the aviation exclusion clause in which the words "except as a fare-paying passenger" have been used to indicate affirmative coverage of mere passengers while excluding those actually engaged in operational phases of airplane travel.

The foregoing has been recited to indicate that the courts have gradually changed their construction of aviation exclusion clauses in insurance policies to conform to the development of air transportation. In the beginning the courts considered aviation as an experiment and any person who took a flight in an airplane, even as a passenger, was considered as engaging in or participating in aviation. When air transportation began to be accepted as an ordinary mode of travel, the courts, as indicated above, reversed these earlier decisions.

Extensive consideration of the holding of the court in the *Clapper* case, *supra*, with respect to ambiguity of the particular aviation exclusion clause "from an aeronautic flight" is not believed to be helpful because insurance counsel are so familiar with this argument in other cases as well as in those involving aviation exclusion clauses. Our work has indicated that 15 cases have specifically held that particular aviation exclusion clauses were ambiguous and that the ambiguity should be resolved against the particular insurance company.[33] There have been 11 cases in which

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120 W. Va. 262, 197 S.E. 723, 1938 U.S.Av.R. 124 (1938); *Massachusetts Protective Association v. Bayersdorfer*, 105 F. (2d) 595, 1939 U.S.Av.R. 182 (U.S.C.C.A. 6th, 1939).

[30] *Benefit Assn. Railway Employees v. Hayden*, 174 Ark. 565, 229 S.W. 995, 57 A.L.R. 622, 235 C.C.H. §221, 1929 U.S.Av.R. 79 (1927); *Peters v. Prudential Insurance Company*, 133 Misc. 780, 233 N.Y.S. 500, 1929 U.S.Av.R. 67 (N. Y. Sup. Ct. 1929); *Masonic Accident Insurance Company v. Jackson*, 200 Ind. 472, 164 N.E. 628, 1929 U.S.Av.R. 84 (1929); *Flanders v. Benefit Association of Railway Employees*, 226 Mo. App. 142, 42 S.W. (2d) 973, 1932 U.S.Av.R. 60 (1931); *Wendorff v. Missouri State Life Insurance Co.*, 318 Mo. 363, 1 S.W. (2d) 99, 1928 U.S.Av.R. 26 (1928).

[31] *Gits v. New York Life Insurance Company*, 32 Fed. (2d) 7, 1929 U.S.Av.R. 70 (U.S.C.C.A. 7th, 1929); *Missouri State Life Insurance Company v. Martin*, 188 Ark. 907, 69 S.W. (2d) 1081, 1934 U.S.Av.R. 57 (1934); *Kansas City Life Insurance Co. v. Wells*, 133 Fed. (2d) 224, 1944 U.S.Av.R. 47 (U.S.C.C.A. 8th, 1943).

[32] *Mayer v. New York Life Insurance Company*, 74 Fed. (2d) 118, 1934 U.S.Av.R. 31 (U.S.C.C.A. 6th, 1934); *Goldsmith v. New York Life Insurance Company*, ... F. Supp. ...., 1933 U.S.Av.R. 75 (U.S.D.C. Mo. 1932) 1934 U.S.Av.R. 82, Affirmed 69 Fed. (2d) (U.S.C.C.A. 8th, 1934); *Head v. New York Life Insurance Co.*, 43 Fed. (2d) 517, 1930 U.S.Av.R. 234 (U.S.C.C.A. 10th, 1930).

Provident Trust Company v. Equitable Life Assurance Society, 316 Pa. 121, 127 Atl. 701, 1934 U.S.Av.R. 47 (1934); *King v. Equitable Life Assurance Society*, 232 Iowa 541, 5 N.W. (2d) 845, 1942 U.S.Av.R. 61 (1942); *Day v. Equitable Life Assurance Society*, 83 Fed. (2d) 147, 1936 U.S.Av.R. 168 (U.S.C.C.A. 10th, 1936). Cert. Den. 299 U.S. 548, 57 Sup. Ct. 11, 81 L. Ed. 812, 1937 U.S.Av.R. 173 (1936); *Hartol Products Corporation v. Prudential Insurance Company*, 290 N.Y. 44, 47 N.E. (2d) 687, 1943 U.S.Av.R. 44 (1943); *National Bank of Commerce v. New York Life Insurance Company*, ... Tenn. ....., 181 S.W. (2d) 151, 1944 U.S.Av.R. 48 (1944).

[33] *Peters v. Prudential Insurance Company*, 133 Misc. 780, 233 N.Y.S. 500, 1929 U.S.Av.R. 67 (N. Y. Sup. Ct., 1929); *Gits v. New York Life Insurance Company*, 32 Fed. (2d) 7, 1929 U.S.Av.R. 70 (U.S.C.C.A. 7th, 1929); *Masonic Accident Insurance Company v. Jackson*, 200 Ind. 472, 164 N.E. 628, 1929 U.S.Av.R. 84 (1929); *Provident Trust Company v. Equitable Life Assurance Society*, 316 Pa. 121, 127 A. 701, 1934 U.S.Av.R. 47 (1934); *Missouri State Life Insurance Company v. Martin*, 188 Ark. 907, 69 S.W. (2d) 1081, 1934 U.S.Av.R. 57 (1934); *Martin v. Mutual Life Insurance Co.*, 189 Ark. 291, 71 S.W. (2d) 694, 1934 U.S.Av.R. 73 (1934); *Charette v. Prudential Insurance Co.*, 202 Wis. 470, 232 N.W. 848, 1931 U.S.Av.R. 48 (1930); *Gregory v. Mutual Life Insurance Co.*, 78 Fed. (2d) 522, 1934 U.S.Av.R. 53 (U.S.C.C.A. 8th, 1934). Cert. Den. 296 U.S. 635, 56 Sup. Ct. 157, 80 L. Ed. 451, (1935); cf.: *Aschenbrenner v. United States Fidelity and Guaranty Co.*, 292 U.S. 80,

the courts have held that no ambiguity existed with respect to particular aviation exclusion clauses.[24]

In very few fields of law have there been so many reversals of precedents as in the cases involving the aviation exclusion clauses mentioned above. In view of the willingness of the courts to reverse precedents in this field, any attorney who has a case involving an aviation exclusion clause should give most careful study to the possibility that older precedents in his jurisdiction may be reversed at the first opportunity.

84-5: "The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training, and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted"; *Day v. Equitable Life Assurance Society*, 83 Fed. (2d) 147, 1936 U.S.Av.R. 168 (U.S.C.C.A. 10th, 1936). Cert. Den. 299 U.S. 548, 57 Sup. Ct. 11, 81 L. Ed. 812, 1937 U.S.Av.R. 173 (1936); *Swasey v. Massachusetts Protective Association*, 96 Fed. (2d) 265, 1938 U.S.Av.R. 96 (U.S.C.C.A. 9th, 1938); *Mutual Benefit Health and Accident Association v. Moyer*, 94 Fed. (2d) 906, 1938 U.S.Av.R. 102 (U.S.C.C.A. 9th, 1938); *Massachusetts Protective Association v. Bayersdorfer*, 105 Fed. (2) 595, 1939 U.S.Av.R. 182 (U.S.C.C.A. 6th, 1939); *Mutual Benefit Health and Accident Association v. Bowman*, 96 Fed. (2d) 7, 1938 U.S. Av.R. 91 (U.S.C.C.A. 8th, 1938); *King v. Equitable Life Assurance Society*, 232 Iowa 541, 5 N.W. (2d) 845, 1942 U.S.Av.R. 61 (1942); *Hartol Products Corporation v. Prudential Insurance Co.*, 290 N.Y. 44, 47 N.E. (2d) 687, 1934 U.S.Av.R. 44 (1943).

[24]*Bew v. Travelers Company*, 92 N.J.L. 533, 112 A. 849, 14 A.L.R. 983, 1928 U.S.Av.R. 151 (1921); *Travelers Insurance Co. v. Peake*, 82 Fla. 128, 89 S. 418, 1928 U.S.Av.R. 156 (1921); *Meredith v. Business Men's Accident Association*, 213 Mo. App. 683, 252 S.W. 976, 1928 U.S.Av.R. 159 (1923); *Price v. Prudential Insurance Co.*, 98 Fla. 1044, 124 S. 817, 1930 U.S.Av.R. 118 (1929); *First National Bank of Chattanooga v. Phoenix Mutual Life Insurance Co.*, 57 Fed. (2d) 731, 1932 U.S.Av.R. 64 (U.S.D.C. Tenn. 1932); 63 Fed. (2d) 681, 1933 U.S.Av.R. 67 (U.S.C.C.A. 6th, 1933); *Irwin v. Prudential Insurance Co.*, 5 Fed. Supp. 382, 1934 U.S.Av.R. 77 (U.S.D.C. Mich. 1933); *Goldsmith v. New York Life Insurance Co.*, 69 Fed. (2d) 82, 1934 U.S.Av.R. 82 (U.S.C.C.A. 8th, 1934); *Moyer v. New York Life Insurance Co.*, 74 Fed. (2d) 118, 1935 U.S.Av.R. 31 (U.S.C.C.A. 6th, 1934); *Sneddon v. Massachusetts Protective Association*, 39 N.M. 72, 39 P. (2d) 1023, 1935 U.S.Av.R. 35 (1935); *Ivy v. New York Life Insurance Co.*, 33 Fed. Supp. 841, 1940 U.S.Av.R. 136 (U.S.D.C. Ala. 1940); *Reed v. Home State Life Insurance Co.*, 186 Okla. 226, 97 P. (2d) 53, 1940 U.S.Av.R. 139 (1939).

IV. EXCLUSION OF RISK WHERE INSURED IS ENGAGED OR PARTICIPATING IN AVIATION OR AERONAUTICS "EXCEPT AS A FARE-PAYING PASSENGER"

The *King*,[25] *Quinones*[26] and *Hyfer*[27] cases already discussed herein in considering cases arising out of war service, have all considered the effect of provisions in insurance policies which exclude coverage of injuries or death resulting from engaging or participating in aviation or aeronautics "except as a fare-paying passenger." This clause has been before the courts in other recent cases which are of interest. The most recent of these decisions is that in the *Shank*[28] case where the Supreme Court of Minnesota on December 28, 1945, held that a rider attached to an endowment insurance policy upon the life of an airplane pilot who was killed in the crash of his plane, which reduced the company's liability to the reserve if death ensued "as a result of service, travel or flight in any species of aircraft except when riding as a fare-paying passenger on a regular flight . . ." was invalid. The Court held the purported provision was void as in violation of the provisions of a Minnesota statute specifying the form which policies of life insurance must use in that State. The particular statute permitted the issuance of a special form of policy on the life of a person employed in an occupation classified by the company as extra hazardous and allowed the special form of policy to reduce the insurance liability to an amount equal to the policy's reserve. The Court said in part:

> "The rider was issued in violation of the legislative act which specifies the provisions which must be contained in a policy of life insurance. It therefore offended the public policy of this State. In our view, the whole rider or endorsement is tainted with illegality and void."

According to the Court, neither the fact that the insured had expressly agreed to the rider nor the fact that the Insurance Commissioner had seen but had not disapproved the rider validated its provisions.

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[25]See *supra* note 11.
[26]See *supra* note 12.
[27]See *supra note* 13.
[28]*Shank v. Fidelity Mut. Life Ins. Co.*, 21 N.W. (2d) 235, 1946 U.S.Av.R. 29 (Minn. Sup. Ct. 1945).

This same provision was considered by the Supreme Court of North Carolina in the *Padgett*[39] case in 1934 in holding that where insured was killed in the crash of a plane piloted by his employer, no recovery could be had under this policy as no fare was paid or contemplated for the trip. The particular clause excepted death "while participating in aviation or aeronautics except as a fare-paying passenger." A similar decision was arrived at in the *Holcomb*[40] case in 1935 where it was contended that a fare was to be paid after the flight on which insured was killed. The Court held that since the pilot of the plane held a license which prohibited the flying of aircraft for hire it could not hold that such fare would have been paid.

In 1939 in the *Shain*[41] case, a stewardess was killed in an airplane crash while on duty on a "ferry" trip without passengers and suit was brought to recover double indemnity with the insurance company contending that recovery was barred by an aviation exclusion clause excepting death "from operating or riding in any kind of aircraft, whether as a passenger or otherwise, except as a fare-paying passenger in a licensed passenger aircraft." The Supreme Court of Missouri held that the clear intent of the policy was to exclude liability.

In the *Krause*[42] case, insured was killed in the crash of a T.W.A. transport plane in California while riding on a trip pass without payment of fare except a flight coupon costing $8.00. The pass provided "the user expressly assumes all risks of accidents, regardless of the causes, and absolves the company from all liability therefor" and insured's policy provided in part that it did "not cover loss . . . unless insured is actually riding as a fare-paying passenger." In holding that the expression "fare-paying passenger" means a passenger who pays the regular fare (in this case $94.02), the Court held that the insurer was not liable upon the particular policy for the death of insured.

V. USE OF DOCTRINE OF RES IPSA LOQUITUR IN PROVING CLAIMS BASED ON AVIATION ACCIDENTS

The *Bratt*[43] case, decided on May 20, 1946, by the United States Circuit Court of Appeals, Tenth Circuit, was an aviation accident case where an airliner crashed in Utah killing all aboard and in which a claim for death of a passenger was, according to the Appellate Court's opinion, "submitted to the jury on the doctrine of *res ipsa loquitur*." While this Court reversed the judgment of the District Court on the basis of erroneous refusal to admit certain testimony[44] of two witnesses for the Plaintiff, my concern here is with the doctrine of *res ipsa loquitur*, as it can be applied in making out a *prima facie* case for the Plaintiff, who is claiming damages as a result of an aviation accident. I believe that Insurance Counsel should be especially interested in the application of this doctrine to aviation accident cases because you will find that the doctrine is relied upon by practically all plaintiffs in this type of case.

It is really very difficult to determine the exact cause of most airplane accidents. This is especially true in the case of passengers in an airplane who are injured in such an accident or in the case of the survivor of a person who is killed in an airplane crash, as they do not know all the facts which reveal the degree of care exercised by the air carrier. The public hearings held by the Civil Aeronautics Board

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[39] *Padgett v. Metropolitan Life Insurance Co.*, 206 N.C. 364, 173 S.E. 903, 1934 U.S.Av.R. 50 (1934).

[40] *Metropolitan Life Insurance Company v. Holcomb*, 79 Fed. (2d) 788, 1936 U.S.Av.R. 154 (U.S. C.C.A. 9th, 1935).

[41] *State of Missouri ex rel. Mutual Life Insurance Company v. Shain*, 344 Mo. 276, 126 S.W. (2d) 181, 1939 U.S.Av.R. 114 (1939).

[42] *Krause v. Mutual Life Insurance Co.*, 141 Neb. 814, 5 N.W. (2d) 228, 235 C.C.H. §539, 1942 U.S. Av.R. 55 (1942).

[43] *Bratt v. Western Airlines, Inc.* 235 C.C.H. §1263 (U.S.C.C.A. 10th, May 20, 1946).

[44] The Trial Court had sustained an objection to a question which required an airplane mechanic who "had no scholastic standing in the science of aerodynamics" but who was "a man of practical experience who said he had made a study of the structural stress and strain of the parts of an airplane" to express an opinion on which part of the airplane fell first. The Trial Court had also refused to allow a farmer to testify that he heard the motors of a plane, passing overhead at about the time the crashed plane would have normally passed over this farmer's land, go on and off in such a way as to make a different noise from that heard by him for the past ten years when similar planes passed over his farm. Both rulings were held to be reversible error.

pursuant to the provisions of the Civil Aeronautics Act,[45] and the reports made by that Board on the causes of airplane accidents sometimes indicate the causes in a very definite manner, but in most instances the opposite is true. While the Board's report may not be used as evidence in any court case growing out of the accident, the transcript of the hearing before the Board may be purchased as an aid to the plaintiff in determining the cause of an accident. The Board's accident reports are usually written in such general terms that there is usually speculation as to whether or not a particular accident was caused by an error in the pilot's judgment, by an unforeseen and momentary weather condition, by some unknown and undiscoverable structural defect in the plane, or by any of several other possibilities. In some cases there are no living witnesses to describe exactly what happened at the time of the crash. In most cases, the circumstances surrounding the accident are peculiarly within the knowledge of the air carrier for he has the flight record, what is left of the plane and other facts about the plane and its performance which would not be known to a passenger injured in the accident or to the survivor of a passenger killed in the accident.

Lawyers bringing suits against airlines, and others, for damages caused in airplane accidents have quite naturally attempted to use the rule of evidence known as *res ipsa loquitur* which was developed by the Common Law to meet situations in which direct proof of negligence by a Plaintiff is impossible, but the facts as known would lead most people to a conclusion that the accident would not have occurred in the absence of negligence on the part of the airplane operator. The Latin term *res ipsa loquitur* means "it speaks for itself."

The rule has been applied in cases involving railroads, buses, steamships, stage coaches, automobiles, taxicabs, elevators and airplanes where the Plaintiff proves: (1) that the vehicle or thing through which the accident happened was under the exclusive control or management of the Defendant, (2) that the accident is such as does not in the ordinary course of things happen if due care has been exercised, and (3) that the injury would have occurred without voluntary action or contribution on the part of the person injured.[46] The *res ipsa loquitur* doctrine is peculiarly applicable to common carriers because the vehicle used as such a carrier is usually within the exclusive control of the carrier and it is most difficult for a passenger or a passenger's survivors or their legal representatives to prove just how an accident happened.

Under this doctrine, a Plaintiff suing an airplane operator for injuries incurred in an airplane accident case proves that the airplane was under the exclusive control of the operator, that the accident is of such character that it would not have occurred unless the airplane operator was negligent, and that the Plaintiff was not contributorily negligent. This proof makes out a *prima facie* case for the Plaintiff. The burden is then upon the owner or operator of the airplane who is the Defendant in the case to offer evidence to prove that the airplane was operated in the manner required by law of persons in Defendant's position. The real effect of the doctrine is to shift the burden of proof from the Plaintiff to the Defendant on the issue of negligence or due care. This shifting of the burden of proof has a very material effect on the liability of airplane operators. In an ordinary accident case, the Plaintiff must prove the Defendant's negligence caused his damage or the Court will dismiss his case.

Some Courts emphasize that the reason for the rule is that the facts necessary for the proof of Plaintiff's case are peculiarly within the knowledge of the Defendant. Other Courts emphasize the fact that the rule was developed to prevent meritorious Plaintiffs from losing cases where the accident is one that would be extremely unlikely to happen in the absence of negligence on the part of the Defendant. The California Supreme Court, in *Smith v. O'Donnell*,[47] an aviation accident case, has stated: "The foundation or reason for the doctrine is based upon probabilities and convenience. When it is shown that the occurrence is such as does not ordinarily happen without negligence on the part of

[45] 52 Stat. 1013 (1938); 49 U.S.C. §582 (a) (2).

[46] Goldin, *The Doctrine of Res Ipsa Loquitur In Aviation Law* (1944), 18 So. Calif. L. Rev. 15, 17.

[47] *Smith v. O'Donnell*, 215 Cal. 714, 722, 12 P. (2d) 933, 936, 1932 U.S.Av.R. 145, 152 (1932).

those in charge of the instrumentality, and the thing which occasioned the injury was in charge of the party sought to be charged, the law operating upon the probabilities and the theory that if there were no negligence the Defendant can the most conveniently prove it raises a presumption of negligence which the Defendant must overcome by proof that there was in fact no negligence."

To review and analyze the many aviation accident cases applying or rejecting this doctrine would unduly prolong the length of this paper. My purpose here is to merely indicate that this doctrine looms large in any aviation accident case. The Court decisions are in real conflict and some courts agree with the statement of the Federal District Court of Wyoming in the *Cohn*[5] case opinion that: "It may be that in the not too far distant future in the evolution and development of the wonderful and enchanting science of aviation, a sufficient fund of information and knowledge may be afforded to make a safe basis in compensating for injuries sustaining the application of the doctrine here invoked, but it seems to be quite clear that that time has not yet arrived." In this case the doctrine of *res ipsa loquitur* was relied upon by the Plaintiff in a suit for damages for the death of a person who was invited to participate in a test flight and the plane, which was in charge of a licensed pilot and two mechanics, crashed by reason of some unknown cause.

Perhaps a word should be said, however, of the ultimate effect of the application of the doctrine herein discussed if it is applied in a particular case. Just as there is some disagreement as to when the doctrine of *res ipsa loquitur* may be properly applied in aviation accident cases, so too there is disagreement as to the effect which should be given to the doctrine. Some jurisdictions hold that upon proof of the essentials required for the application of the doctrine, and failure of the Defendant to offer evidence, the case goes to the jury. In other jurisdictions, the proof of a *res ipsa* case entitles the Plaintiff to a directed verdict if the Defendant offers no evidence. Still other jurisdictions hold that the establishment of a *res ipsa* case not only entitled Plaintiff to a directed verdict in the absence of evidence by the Defendant, but also required the Defendant who offers evidence to rebut the Plaintiff's case to assume the burden of proving his freedom from negligence by a proponderance of the evidence.

[5] *Cohn v. United Airlines Transport Corp.*, 17 F. Supp. 865, 1937 U.S.Av.R. 119 (U.S.D.C. Wyo. 1937).

VI. AVIATION ACCIDENTS IN INTERNATIONAL AIR TRANSPORTATION

In the field of international air transportation, I am certain that most of you are familiar with a so-called "Warsaw Convention,"[6] to which the United States is a party, and which contains the following liability limitations:

1. For injury or death to passengers: 125,000 francs or approximately $8-291.87 in United States currency.
2. For baggage and goods: 250 francs per kilogram (unless a higher declaration of value was made at the time the package was delivered to the carrier, and a supplementary sum paid because of such value). This amounts to approximately $16.58 per kilogram in United States currency and a kilogram is approximately 2.046 pounds;
3. Objects of which the passenger takes care himself: 5,000 francs per passenger or approximately $331.67 in United States currency.

These liability provisions are limitations rather than indemnities and the passenger must justify damages within the limits fixed. An air carrier is prohibited from relieving itself of liability or from fixing a lower limit than that laid down in the Convention. In case of damage caused by wilful misconduct by the air carrier or its agent, the liability limitations do not apply.

On July 15, 1946, there was filed in the Supreme Court of the United States a petition for a Writ of Certorari to review an order entered on April 18, 1946, by the Court of Appeals of New York affirming an order of the New York Supreme Court,

[6] The effective date of the convention was February 13, 1933. For the text of the Convention see 49 Stat. 3000 (1934), U. S. Treaty Series 876. The full text is also printed in 1934 U.S.Av.R. 245 and 8 J. Air Law 298.

Appellate Division, of May 21, 1945, which had in turn affirmed a decision of the New York Supreme Court on August 17, 1944, in the *Garcia*[50] case, in which this Warsaw convention had been held applicable to the death of a passenger in the crash of a Pan-American Airways clipper while the plane was attempting to land at Lisbon, Portugal. In this case the passenger had purchased a round trip ticket covering transportation from New York to Bermuda, Bermuda to Lisbon, Lisbon to Natal, and from Natal to New York. This ticket provided that the "transportation under the attached flight coupon (s) is subject to the rules relating to liability established by the Convention of Warsaw of 12th October 1929." The Plaintiff in the case contends that since Portugal is not a party to the Warsaw Convention and since the accident occurred in Portugal, his recovery was not limited by the above quoted limitations of the Warsaw Convention and that the decisions of the courts just named are erroneous. The lower courts had based their decision on Article 1, Paragraph 2 of the Convention which provides that the Convention applies to "transportation in which, according to the contract made by the parties, the place of departure and the place of destination . . . are situated . . . within the territory of a single high contracting party, if there is an agreed stopping place within a territory . . . of another power even though that power is not a party to this Convention." The petition for the Writ of Certiorari also contends that (1) the liability limitations of the Convention violate the due process clause of the Fifth Amendment to the Federal Constitution, (2) that adherence to the Convention by the President, with the advice and consent of the Senate, but without the concurrence of the House of Representatives violates the clause of the Constitution vesting control of foreign commerce in the entire Congress, and (3) that the Convention is not self-executing but requires implementing legislation by the Congress in order to be applicable by the courts as a rule of law. The New York courts overruled similar contentions in deciding the case against Petitioner, and in the *Indemnity Insurance Company*[51] case the court expressly held the Convention to be self-executing.

In the *Wyman*[52] case the United States Supreme Court recently denied a petition for a Writ of Certorari to review a decision in which recovery for the death of a passenger on a Pan-American plane between Guam and Manila while on a through passage from San Francisco to Hong Kong was held to be limited to the amount fixed in the Convention even though death occurred between United States ports.

With respect to the applicability of the Convention's provisions making the contract of transportation the controlling factor, the court said in part: "Plaintiffs now move to set aside this verdict (directed verdict of $8,300.00 or full amount allowed under the Warsaw Convention) as inadequate. It is said that, as the aircraft was lost on a leg of the flight between Guam and Manila, both within the jurisdiction of the United States, the flight was not international and the Warsaw Convention rules are inapplicable. The original place of departure, however, was San Francisco, California, U.S.A., and the final destination was Hong Kong, China. So the ticket purchased by the deceased reads. This is specifically controlling . . . despite breaks in travel en route." This case makes it clear that from the time "international transportation" starts the Convention applies. This means that if a passenger purchases a ticket from St. Louis to London and is killed in a crash as the plane takes off in St. Louis, the Convention will apply if the proper form of ticket has been issued. Where the plane is to make further stops in the United States, or the passenger is to use more than one plane or carrier on the trip, it is possible to have passengers aboard the same plane some of whom are subject to the Warsaw Convention while other passen-

[50] *Garcia v. Pan-American Airways*, 269 App. Div. 287, 55 N. Y. Sup. (2d) 317, 1945 U.S.Av.R. 39 (1945).

[51] *Indemnity Insurance Company v. Pan-American Airways, Inc.*, 58 F. Supp. 338, 1945 U.S.Av.R. 52 (U.S.D.C.N.Y., 1944).

[52] *Wyman v. Bartlett*, 181 Misc. 963, 43 N. Y. Sup. (2d) 420, 1943 U.S.Av.R. 1 (N.Y. Sup. Ct., N.Y.Co. 1943) as affirmed without opinion 267 App. Div. 947, 48 N.Y. Sup. (2d) 459 (1944), affirmed without opinion 293 N.Y. 878 59 N.E. (2d) 785 (1945), Cert. Den. 324 U. S. ——, —— Sup. Ct. —— L. Ed. —— (1945).

gers are making only a domestic trip so are not subject to the Convention.

In the *Garcia* case the Court said in part: *"The Warsaw Convention contains, not only a limitation of liability* as to the individual in the equivalent of the sum of $8,291.87, and to the property loss, *but a declaration of liability on the part of the carrier,* with a defense available to the carrier, as to persons, that the carrier had taken all necessary measures or that it was impossible for it to take such measures and, as to property, that the damage was occasioned by error in piloting, in the handling of the aircraft or in navigation, and that in all other respects the carrier had taken all necessary measures to avoid damage." (Italics supplied).

Without going into a more extended discussion of the other court decisions[13] arising under the Warsaw Convention, it is sufficient in this review of only the more recent cases to point out that with the constant growth in international air travel this Convention will become of more and more importance to lawyers interested in insurance. Many questions of interpretation of this Convention have yet to receive the attention of the courts and with American planes covering practically the entire World the Convention is of immediate practical importance to all insurance and aviation counsel.

VII. WORKMEN'S COMPENSATION AND AVIATION ACCIDENTS

Workmen's Compensation Claims is a field of interest to insurance counsel. Here too aviation accidents and occupational injuries have created legal problems, some of which are new and novel at least in their factual basis.

The *Britton*[14] case, which was decided on April 12, 1946, by the Supreme Court of Wisconsin, is the most recent case in this field. That case involved a claim for Workmen's Compensation for the death of a pilot employed by an airport operator to dust certain crops with insecticide to kill pea lice. This airport operator also conducted a flying school, and transported passengers for hire in addition to his crop dusting work. The pilot met his death while engaged in carrying out the airport operator's contract with a canning company to dust certain fields owned by independent farmers with whom the canning company had an agreement to do the dusting of these particular crops. In considering an appeal from the finding of the Industrial Commission that the pilot was not an employee of the canning company, the Court said:

> "The canning company was not equipped to, nor did it by its employees, engage in the dusting of pea fields by airplane. Padags (the airport operator) was an independent operator and was equipped to do that kind of work. It is true that the canning company made the arrangements with Padags, but it made the arrangements on behalf of the owners of the fields and were authorized so to do."

On the appeal no question was raised as to the finding of the Commission that the airport operator was the employer of the pilot. The real reason for the appeal is, of course, found in the statement by the Court that the airport operator was subject to the workmen's compensation statute's provisions yet "he did not insure his liability under said act."

Insurance counsel interested in this field of workmen's compensation and aviation accidents should take special note of the *Owens*[15] case decided by the Supreme Court of New Jersey on January 18, 1946. The novelty of that case lies not in the question involved, i.e. "Scope of Employment," which is one that has constantly arisen in the workmen's compensation field, but in the fact that it defines that term with respect to a particular activity growing out of aviation employment. In this case the employee was given a posi-

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[13] *Indemnity Insurance Company v. Pan-American Airways, Inc.,* ____ F. Supp. ____, 1945 U.S. Av.R. 46 (U.S.D.C., N.Y., 1944); *Indemnity Insurance Company v. Pan-American Airways, Inc.,* 58 F. Supp. 338, 1945 U.S.Av.R. 52 (U.S.D.C., N.Y., 1944); *Choy v. Pan-American Airways Company,* ____ F. Supp. ____, 1941 U.S.Av.R. 10, 1942 U.S. Av.R. 43 (U.S.D.C., N.Y., 1941); See the following English cases: *Phillippson et at v. Imperial Airways* (1939) A.C. 332, 160 L.T.R. 410, 55 T.L.R. 490 (1939); *Westminster Bank, Ltd. v. Imperial Airways,* 1936 U.S.Av.R. 39 (K.B., 1936); *Green v. Imperial Airways* (1937) 1 K.B. 50, 155 L.T.R. 380, 52 T.L.R. 681, 1936 U.S.Av.R. 184 (1936).

[14] *Britton v. Industrial Commission,* 235 C.C.H. §932 (Wis. Sup. Ct., April 12, 1946).

[15] *Owens v. Bennett Air Service,* 235 C.C.H. §931 (N.J. Sup. Ct., 1946).

tion as mechanic's helper at an airfield near Highstown, New Jersey. The employee was to receive a small salary plus 45 minutes of free flying instructions each week if his services were satisfactory. The employee was both permitted and encouraged to take flights during working hours to "get the feel of the air and get less nervous" and thus become a better mechanic. He was not censured for taking flights with any pilot other than for flying instructions. This employee accepted an invitation to take a flight from the owner of an airplane that had landed at the airport and had been serviced by the employee and a fellow worker. The airplane crashed after it had risen some 150 feet, thereby causing severe injuries both to the employee and to the pilot. In holding that the flight was within the scope of the employee's employment the Court stated:

> "Such flights, including the one taken at the time of the accident, had, in our judgment, ripened into a custom which the employer had 'acquiesced' in and 'tolerated' and had not prohibited. Such a custom 'should not serve as a benefit to the employer and weigh against the employee' . . . Neither was the employee disciplined nor reprimanded for having taken any of the stated flights. His flight at the time of the accident was within the sphere of his employment."

While no question was raised in the *Owens* case as to whether the New Jersey Workmen's Compensation Law covered an employee engaged in aviation occupations, the workmen's compensation statutes of many states seem to be inadequate insofar as coverage of various phases of aviation are concerned. In fact, only the states of Idaho, Illinois, New York and Washington specifically mention aviation at all.

We recently made a complete survey of all decisions of the Courts involving aviation accidents and workmen's compensation and found that while a few new legal problems have arisen as a result of the peculiarities of aviation accidents, on the whole the problems which have been covered in the reported court decisions are common to cases arising in other industrial activity. The one serious defect in existing workmen's compensation statutes seems to be that they were adopted before aviation became a big business and before aviation's peculiarities of occupation were developed, and since such compensation is purely a statutory right many arguments can be made as to whether the legislature intended to include all the novel phases of this new industry. A careful study of the workmen's compensation laws in each state so as to determine the status of aviation accidents under each such law would prove most helpful.

It will be recalled that Federal legislation has been proposed in the workmen's compensation field to cover aviation accidents so as to end the lack of uniformity which now exists between the various state workmen's compensation acts.[34] Such Federal legislation has not, however, received real serious consideration in Congress. As to the desirability of Federal legislation which would supersede state workmen's legislation compensation in this field, certain constitutional problems arise which would require careful exploration so as to determine whether the benefits of uniformity through such legislation will outweigh the difficulties involved in replacing state jurisdiction by Federal control in this important field. Practical as well as legal difficulties seem to be present and these difficulties may or may not prove serious in the final analysis.

APPENDIX A[35]

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[34] Pillsbury, *Application of Federal Compensation Acts to Aviation* (1933), 4 Air Law Rev. 38. Also see H.R. 531, 79th Congress, which would amend the Civil Aeronautics Act of 1938 by adding a new section to make the existing Federal Longshoremen's and Harbor Workers' Compensation Act apply to injuries to employees of air carriers. It is to be hoped that the grave injustices which have grown up under the Federal Employers' Liability Act with respect to railroads will be avoided in the aviation field. See Winters, *Interstate Commerce in Damage Suits* (1946), 29 Journal of the American Judicature Society 135.

[35] See page 26 for explanation of this appendix.

C—Degree of Care Required of Common Carriers.
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E—Statutory Provisions Applicable to Aircraft Operator Liabilities.

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DISCUSSION BY JOHN RANDALL
Cedar Rapids, Iowa

I SHOULD preface my remarks by saying that I am definitely not an expert in this field. I not only approach it with an open mind, but almost a vacant one. (Laughter).

I presume that of the group that is assembled here there will be very few of us who will be called upon by Mr. Orr or the other gentlemen having control of such business to defend catastrophic losses occurring by the crash of transports that are flying in commercial aviation. However, I presume that in every state, as in Iowa, it is true that more and more airports are being developed. There is a greater incentive to the private owner to own and fly planes. For instance, in Iowa we have a club that is known as the "Flying Farmers." I believe they get together during good weather, and sometimes weather that is not so good, about every two weeks or once a month. It is not to be doubted that one of the "Flying Farmers" will probably invite a friend of his to go along with him. Therefore, it seems to me, in discussing this paper, it would be well to do so from the standpoint of the ordinary lawyer who may be called upon by a life insurance company or accident insurance company to defend an injury or death which may arise out of the flight of a private plane.

I was very much impressed with the statement made by one of the speakers to the effect that we should be very careful to see that a precedent upon which we might rely will not be reversed subsequently by our courts. Suppose a "Flying Farmer" is flying along and engine trouble develops and the only available spot to land would be a river. In that case, I suppose we could then expect to be confronted with the King case or the Bull case. In other words, no matter what type of exclusion that you may have had in the insurance policy, undoubtedly the lawyer for the plaintiff would be clever enough to pick up the precedent which was established by these two cases.

Suppose Bill Jones has an airplane and he decides that he wants to fly down to Champaign, Illinois, to attend a football game. He speaks to Tom Smith and says, "I will fly down to Champaign to go to the football game if you will buy the gas." Then we are confronted with the proposition as to whether or not the gentleman who rode along was a fare-paying passenger under the particular type of exclusion clause that may exist in the accident insurance policy or life insurance policy.

It also occurs to me that, in connection

with casualty claims, those of us who may be called upon to defend a casualty claim in some small community in the middle-west may have more difficulty in securing the facilities of experts, such as commercial flyers are able to produce as their witnesses. In other words, it will be a question as to whether the pilot was negligent in taking off when the weather was not fit to permit him to proceed. There will also be the question as to whether or not that overhaul job he did two months before was sufficient to make his plane a proper flying instrumentality.

I am not going to take up a great deal more time because all that I was expected to do was to lead the discussion. It was my understanding that I was to suggest ideas to the rest of you gentlemen so that you could get up and ask the experts exactly what sort of a defense you would put up if you were confronted with situations such as I have suggested. I know you all want to get out to your golf. Probably you all have a lot of questions which I haven't touched upon, but those were some of the questions that occurred to me as I read this most excellent paper and heard the most excellent talk by our speaker.

Declaratory Judgments in Liability Insurance Cases

By David J. Kadyk
Chicago, Ill.

I AM supposing that your client's assured is sued for personal injuries or property damage resulting from some accident; that the assured claims coverage under his policy with respect to the claim and tenders the defense of the case to your client; and that one of the numerous possible questions of coverage is involved, giving your client a possible policy defense.

For good and sufficient reasons, you would like to know whether the policy covers the claim before determination of the assured's liability to the claimant. If the policy covers the claim, you may want to settle with the claimant before trial; if it does not cover, you may want to withdraw from the case rather than putting up an expensive defense. Where the law on the subject in your jurisdiction is unsettled, or where the question depends on the uncertain testimony of witnesses, or will present a disputed question of fact, you cannot know the ultimate answer to the coverage question without determination by a court.

Where it is important to determine the coverage question before determination of the assured's liability, it is in most situations possible to determine it by a suit for Declaratory Judgment. Since 1934 it has been possible to maintain such a suit in the Federal Courts, and forty-three states[1] now have such statutes.

These statutes of course vary, as do the judicial interpretations of them. In New Hampshire it is said the question of coverage should, as a general rule, be determined before trial of the claim against the assured through proceedings for declaratory judgment;[2] on the other extreme, such an action will apparently not be entertained by the state courts of Michigan;[3] and the courts of some other states seem to regard such actions unfavorably.[4]

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[1]All except Arkansas, Delaware, Louisiana, Mississippi and Oklahoma. See Historical Note to Ill. Stat. Ann., Ch. 110, Sec. 181.1. In 1945 Illinois became the 43rd state to pass such a statute.

[2]Merchants Mutual Casualty Co. v. Kennett. 90 N.H. 253, 7 A. 2d 249.

[3]State Farm Ins. Co. v. Wise, 277 Mich. 643, 270 N.W. 165; Wolverine Ins. Co. v. Clark, 277 Mich. 633, 270 N.W. 167. The rule is not followed by the federal courts in Michigan. New Amsterdam Co. v. Berger, 59 F. Supp. 994; Ohio Casualty Co. v. Miller, 29 F. Supp. 993.

[4]*Massachusetts*: Merchants Mutual Casualty Co. v. Leone, 298 Mass. 96, 9 N.E. 2d 552. *Pennsylvania*: Penn Casualty Co. v. Mack, 41 (Pa.) D. and C. 629, 30 Del. Co. Rep. 301; see 142 A.L.R. 47, Note 25, also see comment in United States Fidelity and Guaranty Co. v. Koch, 102 F. 2d 288, 293. *New York*: National Grange Mutual Co. v. Steere, 36 N.Y.S. 2d 114; this case, however, is contrary to the weight of authority in New York. *Ohio*: Ohio Farmers Ins. Co. v. Hirsch, 143 Ohio St. 519, 56 N.E. 2d 151 (reversing 53 N.E. 2d 662).

Plenty of authority can be found to support a suit for declaratory judgment to determine almost any coverage question that may arise.[5] The cases are too numerous to list here. But on the other hand, the court may, in the exercise of its discretion, dismiss your suit. I want to examine here the reasons for such dismissals.

The early cases in the Federal District Courts which were dismissed as requesting an "advisory opinion," or not involving an "actual controversy," or any "rights" of the plaintiff,[6] may be disregarded, since the Supreme Court decision in *Maryland Casualty Co. v. Pacific Coal and Oil Co.*[7] But there is a troublesome rule under which many suits for Declaratory Judgments have been dismissed, for which Insurance Counsel should be on the lookout. Announced by the United States Supreme Court[8] and followed in the State courts, it is to the effect that the court will not entertain the suit for Declaratory Judgment where another suit between the same parties presenting the same issues is pending in another court.

So, where under the procedure of the state, as in Wisconsin, the insurer can be made a party to the damage suit, it cannot maintain a suit for Declaratory Judgment to determine coverage questions, since these can be settled in the damage suit.[9]

Also, under this rule, you cannot litigate, in a suit for Declaratory Judgment, issues which are or could be issues in the claimant's damage suit against the assured. Don't expect to try the question of the assured's agent's negligence in your suit for Declaratory Judgment.[10] Nor can you assert in this suit a policy defense based on your contention that the assured's driver was not, at the time of the accident, acting as the assured's agent within the scope of his employment,[11] for this is an issue in claimant's damage suit against the assured. Where your policy excludes Workman's Compensation claims, you cannot try in this suit the question whether claimant was an employee,[12] for this is a matter of defense in his common-law action against the assured. Another contention, that the assured sold the insured automobile before the accident, may be both a policy defense and a defense to the damage claim. Where it is, you cannot try it in a Declaratory Judgment suit.[13] In one suit, where the insurer set up a policy defense based on delay in notification, the proof tended to show there was in fact no accident. This of course was a vital issue in the damage suit, and the declaratory judgment suit was dismissed.[14] In at least one jurisdiction the automobile owner's liability for the driver's negligence depends merely on permission rather than agency. In such a state the lack of permission is not only a policy defense but a defense in the damage suit against the assured, and the issue will not be tried in the insurer's Declaratory Judgment suit.[15]

Similarly, in a Declaratory Judgment suit by the insurer against the assured and claimant, the assured will not be permitted by cross-action against the claimant to litigate any question pertaining to its liability for the damage claim.[16]

Several of the Federal Courts have dis-

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[5]"Application of Declaratory Judgment Acts to Questions in Respect of Insurance Policies—Liability Insurance," 142 A.L.R. 67. Anderson, Declaratory Judgments, Ch. 15, Sec. 323. Borchard, Declaratory Judgments, 2d Ed., Part Three, Ch. VI.

[6]Maryland Casualty Co. v. Tindall, 30 F. Supp. 949 (affirmed 117 F. 2d 905), United States Fidelity and Guaranty Co. v. Pierson, 21 F. Supp. 678 (reversed 97 F. 2d 560), Associated Indemnity Corp. v. Manning, 16 F. Supp. 430 (reversed 92 F. 2d 168); Maryland Casualty Co. v. Consumers Finance Service, 23 F. Supp. 433 (reversed 101 F. 2d 514; Maryland Casualty Co. v. United Corporation, 29 F. Supp. 986 (reversed 111 F. 2d 443); Ohio Casualty Co. v. Marr, 21 F. Supp. 217 (affirmed 98 F. 2d 973; cert. den. 305 U.S. 652).

[7]312 U.S. 270; 85 L. Ed. 826, 61 S. Ct. 510; Feb. 3, 1941.

[8]In Brillhart v. Excess Ins. Co., 316 U.S. 491, 86 L. Ed. 1620, 62 S. Ct. 1173.

[9]Auto Mutual Indemnity Co. v. Moore, 235 Ala. 426, 179 So. 368; New Amsterdam Casualty Co. v. Simpson, 238 Wis. 550, 300 N.W. 367.

[10]Pennsylvania Casualty Co. v. Thornton, 61 F. Supp. 753.

[11]State Farm Ins. Co. v. Hugee, 115 F. 2d 298; Columbia Casualty Co. v. Thomas, 20 F. Supp. 251, 101 F. 2d 151. *Contra*: Associated Indemnity Corp. v. Manning, 92 F. 2d 168, 107 F. 2d 362.

[12]Maryland Casualty Co. v. Boyle, 123 F. 2d 558; United States Fidelity and Guaranty Co. v. Savoy Grill, 51 Ohio App. 504, 1 N.E. 2d 946; Indemnity Insurance Co. v. Schriefer, 142 F. 2d 851; *Contra*: American General Insurance Co. v. Booze, 146 F. 2d 329.

[13]Utica Mutual Ins. Co. v. Beers, 294 N.Y.S. 82.

[14]Ohio Casualty Co. v. Marr, 98 F. 2d 973; cert. den. 305 U.S. 652.

[15]Travelers Indemnity Co. v. Burg, 1 N.Y.S. 2d 172.

[16]Ohio Casualty Co. v. Murphy, 28 F. Supp. 252.

missed cases on the aforementioned grounds for the reason that when the parties are aligned according to their true interests, that is, insurer and assured against claimant, instead of insurer against assured and claimant, the requisite diversity of citizenship is lost." I have no criticism of this reasoning, but wish to point out that the same result is reached in cases where no question of diversity is involved. The more fundamental reason is, I think, that the court where the Declaratory Judgment action is pending does not like to interfere with the claimant's damage suit by deciding one of the issues properly triable in the damage suit.

Therefore, where the coverage questions previously mentioned are not issues in the damage suit, then they are properly triable in the suit for Declaratory Judgment. For instance, where the damage suit had been brought against the assured's driver but not against the assured, the insurer was allowed to try in a Declaratory Judgment suit the question as to whether the claimant was an employee of the assured.[17] In this case the policy defense depended on this question, but it could not be an issue in the damage suit. Where the assured's liability to the claimant does not depend on mere permission given to someone to drive the automobile, or where the driver but not the named assured has been made a defendant in the damage suit, then the question of permission affects the coverage but not the liability to the claimant, and it may properly be tried in the insurer's Declaratory Judgment suit.[18] Also, in a situation where coverage but not the assured's liability to the claimant depends on whether the vehicle was being put to "commercial use" at the time of the accident, the question may be tried in the insurer's declaratory judgment suit.[19]

A situation arose in one of the New York cases I have referred to[20] which interests me considerably. In that case the insurer set up two policy defenses in his suit for declaratory judgment: (1) that the driver did not have the permission of the named assured, and (2) that the use was not "commercial" within the meaning of the coverage. The first policy defense involved determination of facts in issue in the claimant's damage suit against the assured, and therefore the suit for Declaratory Judgment was dismissed, although the second policy defense was properly the subject matter for Declaratory Judgment.

This situation could arise very often. That is, you could have several policy defenses, one of them involving determination of facts in issue in the damage suit. Are you thereby precluded from bringing suit to establish any policy defense? I think it should be possible to bring suit setting up only the policy defenses properly triable in the Declaratory Judgment suit, that is, those policy defenses not involving determination of issues in the damage suit.

The word "waiver" will immediately occur to you. Would not the bringing of a Declaratory Judgment suit to establish certain policy defenses waive all known policy defenses not set up in your complaint? I certainly think you would run a very serious risk of waiving all such policy defenses. To avoid this risk I would suggest trying the following procedure. File a complaint for Declaratory Judgment setting up all known policy defenses. If some are not properly triable because in issue in the damage suit, probably one of the defendants will move to dismiss, and the court will sustain his motion. Have the court order show the reasons for dismissing the complaint, and ask leave to file an amended complaint. If the court grants leave, include in the amended complaint only those policy defenses which were not found objectionable by the court in its order of dismissal.

Frankly, I have not been confronted yet with this situation and have not had occasion yet to try out this suggestion. I believe, however, that the suggested procedure should eliminate the possibility of a finding that you have waived those policy defenses which you are not allowed to litigate in your suit for declaratory judgment.

I have taken most of my time with what seems to me a very fascinating question, the issues that may be tried in the Declaratory Judgment suit. The answer de-

[17]Home Indemnity Co. v. Plymouth, 146 Ohio St. 96, 64 N.E. 2d 248.

[18]Western Casualty Co. v. Beverforden, 93 F. 2d 166; American Cas. Co. v. Windham, 107 F. 2d 88.

[19]Carnes v. Employers Liability Corp., 101 F. 2d 739; Farm Bureau Mutual Co. v. Daniel, 92 F. 2d 838.

[20]Travelers Indemnity Co. v. Burg, 1 N.Y.S. 2d 172.

pends upon a close analysis of the basis of the policy defense, and the parties and issues in the damage suit under the various laws and practice of the individual states.

I wish to add a few words about the timing of the Declaratory Judgment. First, it is to be noted that whether the Declaratory Judgment action is instituted before the damage suit or vice versa does not affect the question as to what issues can be tried in it.[21]

Second, don't count on being able to obtain an injunction or stay order from a Federal Court to prevent the damage suit from being tried before determination of the Declaratory Judgment suit. Of course, in most cases you want the coverage question determined before trial of the damage suit. But your application for injunction or stay order will probably be refused.[22] Instead, the Federal Rules provide that the court may order a speedy hearing of an action for a Declaratory Judgment and may advance it on the calendar.[23] Similarly, our Illinois statute,[24] and I suppose the statutes of some other states, provides that the case may be set for early hearing as in the case of a motion.

Third, in case the damage suit is tried and results in a judgment against your assured before trial of the Declaratory Judgment suit, what happens to your suit? In many cases you will still want to obtain the Declaratory Judgment. Whether the court will dismiss the Declaratory Judgment suit or not seems to depend on the theory and practice of the various state statutes relating to supplemental proceedings against the insurer to collect on a judgment against the assured. The Federal Courts sitting in some states will dismiss the Declaratory Judgment suit;[25] in others, the suit may continue.[26]

[21]Pennsylvania Casualty Co. v. Thornton, 61 F. Supp. 753; New Amsterdam Casualty Co. v. Simpson, 238 Wis. 550, 300 N.W. 367; State Farm Ins. Co. v. Hugee, 115 F. 2d 298.

[22]U.S.C.A. Tit. 28, Sec. 379; Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U.S. 270; Borchard, Declaratory Judgments, 2d Ed. pp. 661-665. "Injunction against Threatened or Pending State Court Actions," 142 A.L.R. 50.

[23]Federal Rules of Civil Procedure, Rule 57.

[24]Ill. Rev. Stat. Ch. 110, Sec. 181.1 (2).

[25]Aetna Casualty and Surety Co. v. Quarles, 92 F. 2d 321; American Automobile Ins. Co. v. Freundt, 103 F. 2d 613; Standard Accident Ins. Co. v. Leslie, 55 F. Supp. 134.

[26]Employers' Assurance Corp. v. Ryan, 109 F. 2d 690; United States Fidelity and Guaranty Co. v. Koch, 102 F. 2d 288; Western Casualty Co. v. Beverforden, 93 F. 2d 166.

Recovery Over

By Wm. E. Knepper
Columbus, Ohio

WHENEVER tort-feasors are primarily and secondarily liable to an injured party, the question of indemnity comes up for consideration and it is that subject that we are here examining under the title, "Recovery Over."

"A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability."[1]

An implied contract of indemnity arises in favor of a person who, without any fault on his part, is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, the former having a right of action against the latter for indemnity, provided they are not joint tort-feasors in such sense as to prevent recovery. This right of indemnity is based upon the principle that every one is responsible for his own negligence, and if another person has become vicariously liable to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him. It exists independently of statute, and whether or not contractual relations exist between the parties, and whether or not the negligent person owed the other

[1]Restatement of Restitution, page 418, Sec. 96.

a special or particular legal duty not to be negligent.[2]

We must be sure to distinguish between contribution and indemnity. "Contribution is the right of one who has been charged with a common liability or burden to recover of another, also liable, the aliquot portion which he ought to pay or bear."[3] Indemnity is defined as that which "enables one secondarily liable for a tort, who has paid the injured party, to shift the entire burden of the loss to the one principally at fault."[4] Indemnity imparts the idea of reimbursement in full on the theory of a primary liability resting on the person from whom recovery is sought.[5]

In any case involving vicarious liability, the primary liability to the extent of full compensation rests upon the party who actually commits the wrong, while the secondary liability rests upon the party who, by reason of his relationship to the wrongdoer, is also liable for the wrong committed. If the latter is compelled to pay for an injury caused by the former, he may be subrogated to the rights of the injured party against the wrongdoer, provided, of course, he was legally chargeable with liability.[6] This is the basis for "Recovery Over," but the application of the rule to the cases is much less simple than its statement.

An early Ohio case illustrates a primary aspect of the doctrine of recovery over. In the city of East Liverpool, a pedestrian was injured when she fell into a coal vault under a sidewalk, which vault had been constructed by the abutting property owner. The court said that the tort of the city consisted of the violation of a statute requiring the sidewalks to be kept open, in repair, and free from nuisance, while the tort of the abutting owner consisted of the creation of a nuisance, dangerous to those using the walk. These were held to be concurrent and related torts, but not joint, so that if recovery were had against the city it might in turn recover over from the abutting property owner, the perpetrator of the wrong.[7]

In Youngstown, Ohio, a man named Herron fell through a steel door in the sidewalk. He made a settlement with the lessees of the abutting property, reserving his rights against the city of Youngstown and the owner of the property. He then sued the owner but failed to obtain a judgment. Thereafter, in an action by Herron against the city, the court held that the release of the lessee and the judgment in favor of the owner estopped Herron from proceeding against the city because the city's liability was secondary and it had been deprived of its right of reimbursement, or recovery over, by the former proceedings.[8]

A number of cases involve the respective rights of the various parties concerned where a pedestrian sustains injuries by falling into an open trap door in the sidewalk and then brings an action against the abutting property owner who in turn seeks recovery over from the independent contractor who opened the doors and left them open. The rule is that both the abutting owner and the independent contractor are liable to the injured pedestrian, but where the abutting owner is free from actual fault yet is made to respond to the damage claim of the injured party, he has a right of recovery over from the contractor whose active negligence caused the injury.[9]

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[2]31 Corpus Juris, 447, Sec. 27; page 449, Sec. 49, ibid; 27 American Jurisprudence, 465, Sec. 16; page 467, Sec. 18; Morris v. Woodburn, 57 Ohio St., 330, 48 N.E., 1097; Bello v. City of Cleveland, 106 Ohio St., 94, 138 N.E., 526; Herron v. City of Youngstown, 136 Ohio St., 190, 24 N.E. (2d) 708; Losito v. Kruse, Jr., 136 Ohio St., 183, 24 N.E. (2d), 705, 126 A.L.R., 1194; Larson v. Cleveland Ry. Co., 142 Ohio St., 20, 50 N.E. (2d), 163; Thweatt's Admr. v. Jones, Admr., 22 V. (1 Rand.), 328; Washington Gas Light Co. v. District of Columbia, 161 U.S., 316, 40 L. Ed., 712, 16 S. Ct., 564; Lowell v. Boston and Lowell Rd. Corp., 40 Mass. (23 Pick.), 24, 34 Am. Dec., 33; City of Brooklyn v. Brooklyn City Rd. Co., 47 N.Y., 475, 7 Am. Rep. 469; Union Stock Yards Co. of Omaha v. Chicago B. and Q. Rd. Co., 196 U.S., 217, 49 L. Ed., 453, 25 S. Ct., 226; City of Boston v. Worthington, 76 Mass. (10 Gray), 496, 71 Am. Dec., 678; Littleton v. Richardson, 34 N.H., 179, 66 Am. Dec., 759; Scott v. Curtis, 195 N.Y., 424, 88 N.E., 794, 133 Am. St. Rep., 811, 40 L.R.A. (N.S.), 1147; Schwartz v. Merola Bros. Construction Corp., 290 N.Y., 145, 48 N.E. (2d), 299; an annotation in 70 A.L.R., 1386.

[3]Parten v. First National Bank and Trust Co., 204 Minn. 200.

[4]21 Minn. Law Review 764.

[5]Missouri District Telegraph Co. v. Southwestern Bell Telephone Co., 93 S.W. (2) 19.

[6]50 American Jurisprudence 707.

[7]Morris v. Woodburn, supra.

[8]Herron v. City of Youngstown, supra.

[9]Churchill v. Holt, 127 Mass. 165, 34 Am. Rep. 355; Scott v. Curtis, supra; and Globe Indemnity Co. v. Schmitt, 142 O.S. 595, 53 N.E. (2) 790.

The weight of authority supports the proposition that where both master and servant are liable to a third party for the tort of the servant, a valid release of either master or servant from liability for the tort operates to release the other.[10] The basis for that rule seems to be that in the states where it obtains, the courts take the position that the release of one tort-feasor releases all.[11]

The doctrine of recovery over is discussed in connection with some such cases. For example, a New York court says that if a release of either the master or the servant did not discharge the other, the situation could be that although an injured party had settled with the master, he might then sue and recover against the servant who would also be liable in a suit brought against him by the master, thus forcing the servant to pay twice for the one wrong.[12]

Then there is authority that a settlement with and release of a master from liability for damages arising out of the negligence of his servant only serves to reduce the claim of the injured party against the servant *pro tanto*, but does not bar an action against him to recover the remainder of his damages.[13] And this rule has been applied in states in which the master and servant may be joined as defendants, as well as in those states where the joinder is not permitted.

So it seems to be the rule that where, under the doctrine of *respondeat superior*, a master becomes vicariously liable for injuries caused solely by the negligent act of his servant, and is obliged to respond in damages by reason of such liability, he will be subrogated to the rights of the injured party and may recover over from the servant, the one primarily liable.[14]

An employer becomes vicariously liable to third persons injured because of the negligence of his independent contractor in performing work for the employer which is dangerous in itself or is dangerous because of the manner in which it is done.[15]

Under such circumstances the employer is entitled to indemnity from the contractor for loss sustained because of the contractor's negligence, unless the employer not only knew of the dangerous situation, brought about by the work of the contractor, but acquiesced in its continuance,[16] or unless the employer was jointly guilty of the negligence which caused the injury.[17] But where one of two joint tort feasors has been compelled to pay damages for the joint tort, he cannot maintain an action against his co-wrongdoer for indemnity.[18]

In a New Hampshire case[19] the plaintiff, a building owner, had paid a judgment against himself on account of a personal injury to a passenger resulting from the collapse of a defective elevator installed in his building. The plaintiff then sought indemnity from the manufacturer who had defectively repaired belts furnished for the elevator, and which gave way causing the elevator to collapse. In the personal injury action, the building owner was charged with negligence in two respects, namely, in using a cemented belt instead of a wire cable, and in failing to provide the elevator with certain safety devices. A general verdict was rendered in favor of the injured passenger and against the owner. In the action to recover over, the plaintiff building owner introduced the record in the former case, supplemented by evidence of negligence of the manufacturer in the repair of the belt. A verdict was directed for the defendant belt manufacturer and the resulting judgment was affirmed by the Supreme Court, which

[10]126 A.L.R. 1199.

[11]50 A.L.R. 1060.

[12]Gavin v. Malherbe, 261 N.Y.S. 373, 266 N.Y.S. 897, 264 N.Y. 403.

[13]Wright v. McCord, 205 Ala. 122, 88 So. 150; Losito v. Kruse, supra.

[14]50 American Jurisprudence 707.

[15]Richman Bros. Co. v. Miller, 131 O.S. 424, 3 N.E. (2d) 360.

[16]Restatement of Restitution, Sec. 95; Alabama Power Co. v. Curry, 228 Ala., 144, 153 So. 634; City of Nashville v. Singer and Johnson Fertilizer Co., 127 Tenn., 107, 153 S.W., 838; Acheson v. Miller, 2 Ohio St., 203, 59 Am. Dec., 663; Horrabin v. City of Des Moines, 198 Iowa, 549, 199 N.W. 988, 38 A.L.R. 554.

[17]Restatement of Restitution, Sec. 102; Dow v. Sunset Telephone and Telegraph Co., 162 Cal., 136, 121 P., 279; Penna. Co. v. West Penn Rys. Co., 110 Ohio St., 516, 144 N.E., 51; United States Casualty Co. v. Indemnity Ins. Co. of North America, 129 Ohio St., 391, 195 N.E. 850.

[18]Northern Ohio Ry. Co. v. Akron Canal and Hydraulic Co., 7 C.C. (N.S.), 69, 18 C.D., 51, affirmed without opinion, 75 Ohio St., 620, 80 N.E. 1130; City of Louisville v. Louisville Ry. Co., 156 Ky., 141, 160 S.W., 771, 49 L.R.A. (N.S.), 67.

[19]Gregg v. Page Belting Co., 69 N.H. 247, 46 A. 25. See also City of Puyallup v. Vergowe, 95 Wash. 320, 163 P. 779.

held that the judgment in the first suit based upon a general verdict was conclusive upon the issue that the building owner had been negligent in failing to install safety devices on the elevator and that he was a joint tort-feasor with the manufacturer of the belt, and as such, could not recover indemnity.

In another interesting case, the Dingle-Clark Company was an electrical sub-contractor working on the installation of certain equipment in a new building at North Braddock, Pennsylvania. It, in turn, subcontracted to the Fay Moving Company the work of moving some heavy machinery from railroad cars to the basement of the building, which was dark and poorly lighted. In order to move part of this machinery, the Fay Company removed a barrier which had been erected around a pit in the basement and Henzi, an employee of another subcontractor, fell into the pit. He sued the Steel Company, for which the new building was being erected, and an agreed verdict was rendered in his favor. The liability insurer paid the judgment and sued the Dingle-Clark Company and the Fay Company for reimbursement. It was conceded that the insurance company was subrogated to all of the rights of the Steel Company against the defendants.

The court pointed out that Henzi's petition in the original action against the Steel Company charged it with failure to barricade the pit and failure to light the premises and that the general verdict of the jury constituted a finding against the Steel Company on both issues. On the basis of these conclusions, it was held that the negligence of the Steel Company was concurrent with that of the Fay Moving Company. Accordingly, since the insurance company stood in the shoes of the Steel Company, it was denied reimbursement.[20]

In any case in which the possibility of recovery over is contemplated it is exceedingly important to determine whether the liability of the wrongdoers is primary and secondary, or whether it is joint. This important distinction is well made in two leading cases of the Supreme Court of the United States,[21] wherein it is held that one who is liable vicariously because of the fault of another may recover over from the other, but two tort-feasors who have been guilty of joint neglect of duty have no rights of indemnity between them.

It is said that all joint torts are concurrent but that some concurrent, though related, torts are not joint.[22] "Joint tort-feasors" are defined as wrongdoers who act in concert in the execution of a common purpose,[23] but they may also be two or more persons who, under circumstances creating primary accountability, directly produce a single, indivisible injury by their concurrent negligence, even though there is no common duty, common design or concerted action between them. [24]

With reference to this subject of recovery over, insurance companies stand in the shoes of their policyholders. It is the general rule that the right of an indemnitor of a concurrent tort-feasor to indemnity from the co-wrongdoer, or his indemnitor, depends upon the right of the concurrent tort-feasor to indemnity against his co-wrongdoer.[25] Time does not permit the discussion of the many ingenious attempts made by insurers to circumvent the strict application of that rule, but reference is made to a few such cases in the footnotes for those who may care to pursue the subject further.[26]

As a final point, it may be observed that the right to indemnity against an actual wrongdoer exists under some circumstance when the one proceeded against in the first instance settles the loss voluntarily instead of having a judgment rendered against him. The mere fact of voluntary

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[20]Massachusetts Bonding and Insurance Co. v. Dingle-Clark Co., 142 O.S. 346, 52 N.E. (2d) 340.

[21]Chicago v. Robbins, 2 Black 418, 17 L. Ed. 298; Union Stockyards Co. of Omaha v. Chicago B. & Q Rd. Co., supra.

[22]Maryland Casualty Co. v. Frederick Co., 142 O.S. 605, 53 N.E. (2d) 795.

[23]Stark County Agricultural Society v. Brenner, 122 O.S. 560, 172 N.E. 659.

[24]Wery v. Seff, 136 O.S. 307, 25 N.E. (2d) 692.

[25]27 American Jurisprudence 468.

[26]United States Casualty Co. v. Indemnity Insurance Company of North America, supra; Royal Indemnity Co. v. Becker, 122 O.S. 582, 173 N.E. 194, 75 A.L.R. 1481; City of New York Insurance Co. v. C. B. Q. Railway Co., 159 Iowa, 129, 140 N.W. 373; Automobile Insurance Co. v. Pennsylvania Rd. Co., 133 O.S. 449, 14 N.E. (2d) 613; Smith v. Fall River Joint Union High School District, 1 Cal. (2) 331, 34 P. (2) 994; Maryland Casualty Co. v. Gough, 146 O.S. 305, 65 N.E. (2d) 858.

payment does not necessarily negative the right to indemnity. However, the one seeking indemnity, or his indemnitor who has actually paid the loss, after making a voluntary settlement, must prove that he gave proper and timely notice to the one from whom recovery is sought, that he was legally liable to respond to the injured party, and that the settlement effected was fair and reasonable."

"Globe Indemnity Co. v. Schmitt, supra; Tugboat Indian Company v. A/S Ivarans Rderi, 334 Pa., 15, 5 A. (2d), 153; Maryland Casualty Co. v. Frederick Co., supra., Middlesboro Home Telephone Co. v. L. & N R.R. Co., 214 Ky. 822, 284 S.W. 104.

Counsel representing one secondarily liable, or his insurer, will do well to consider the prospect of recovery over at the very outset of the litigation. The result of the original action may control the outcome of the suit for indemnity. This makes it quite plain that if the party secondarily liable intends to try to shift the burden of the loss to the primary tortfeasor, it is encumbent upon him to start for this goal at the very beginning of the litigation and keep it in sight all the way along the road. Deviation may well prove fatal to the right to recover over.

Third-Party Practice in Federal Court

By Clarence W. Heyl
Peoria, Ill.

THE introduction of third-party practice as contemplated by Rule 14 is a distinct innovation in federal law and equity practice, although well known in admiralty. Before the adoption of the federal civil procedure rules for the District Court, a federal court under the requirements of the Conformity Act (28 U.S.C.A., Sec. 724) was bound in actions at law to follow the form of practice prevailing in the state in which it sat. This rule did not apply to equity and admiralty suits, as there was a set of federal rules which governed procedure in these cases. The so-called third-party practice in federal courts depended upon the rule of practice of the state in which the court sat. If there was a rule of the state court or a statute of that state, the federal court there sitting followed that procedure, even before the adoption of the rules of civil procedure for District Courts.

It should be noted that the practice authorized by the state statutes or rules of state courts in no case was as comprehensive as the practice prescribed by Rule 14. In some instances the state statute or rule allowed a defendant in the original action to bring in a party who was liable over to him, and not the plaintiff. Rule 14 as it is now constituted permits the defendant to bring in as third-party defendant any person who is liable either to him or to the plaintiff.

Rule 14, as adopted by the Supreme Court of the United States and effective in 1938, is as follows:

"RULE 14. THIRD-PARTY PRACTICE:

(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY. Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses as provided in Rule 12 and his counterclaims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as provided in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the

plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff. The plaintiff may amend his pleadings to assert against the third-party defendand any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

"(b) WHEN PLAINTIFF MAY BRING IN THIRD PARTY. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so."

Since the adoption of the federal civil procedure rules, the federal courts are not bound by any state procedure rule on any matter for which the new rules make provisions, but are governed by the new rules of federal practice, in all cases either originating in the District Court in the first instance or by removal from a state court.

The federal courts in applying Rule 14 are bound under the case of *Erie R.R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, to recognize the substantive liability of the jurisdiction where the cause of action arose. If under the law of the state where the cause of action arose there is no liability on the third-party defendant, he cannot be brought in as a third-party defendant under Rule 14. This is well illustrated in the case of *Brown v. Cranston,* 132 F. (2d) 631. (Writ of certiorari denied in 319 U.S. 741, 87 L. Ed. 1698, 63 S. Ct. 1028). (Appeal from Western District of New York). The plaintiffs were citizens of Pennsylvania and Cranston, the original defendant and third-party plaintiff in each action, was a citizen of New York, the third-party defendants were citizens of Pennsylvania. The order was made by the District Court permitting the bringing in of the third-party defendants upon the theory that they were or might be liable to the original plaintiffs. After the order permitting the bringing in of the third-party defendants was made, the District Judge set aside the orders and dismissed the third-party complaints. The decision of the District Court in this regard was affirmed by the Circuit Court of Appeals, in which the court said:

"While Rule 14, uplike No. 193 (2) of the New York Civil Practice Act, gives the defendant a right to bring in a third person 'who is or may be liable . . . to the plaintiff,' in view of the decisions of the Supreme Court in Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487, and Klaxon Co. v. Stentor Electric Co., 313 U.S. 487, 496, 85 L. Ed. 1477, 61 S. Ct. 1020, we do not feel justified in so construing this rule as to give the defendant a recovery which could not be obtained through any remedy available in the New York State Courts. To do so would attach a greater significance to the choice of the forum than those authorities would seem to sanction. Inasmuch as the original defendant in the case at bar could obtain no contribution in New York, if we held that Rule 14 governed, 'the accident of diversity of citizenship would . . . disturb equal administration of justice in coordinate state and federal courts sitting side by side.' Klaxon v. Stentor Electric Co., 313 U.S. 487, at page 496, 85 L. Ed. 1477, 61 S. Ct. 1020, at page 1021. Such a disposition would be contrary to the whole theory of Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487."

Therefore, at the outset, we have the decision of a Circuit Court of Appeals in which certiorari was denied by the U. S. Supreme Court, holding that a third-party defendant cannot be brought into the case if, under the law of the state in which the cause of action arose, that party was not liable under the substantive law of the state.

In *Barnard-Curtiss Co. v. Maehl,* 117 Fed. (2d) 7, the Circuit Court of Appeals affirmed the District Court in its ruling that the original defendant was not entitled to invoke Rule 14 because there was no showing that the third-party defendant was or might be liable to him or to the plaintiff for all or part of plaintiff's claim against the original defendant. Therefore, a person not made a party to the action by the plaintiff may not be impleaded

by the defendant under Rule 14 unless the third-party defendant is liable to defendant or to the plaintiff.

In the cases heretofore decided, the courts have kept in mind the fact that the rules relate to procedural matters only, and that they do not affect substantive rights. It should be noted that the right to join a third party in the action is likewise confined to the main claim alleged by the plaintiff, or rather the cause of action or transaction out of which the cause of action arose. It does not permit the practice of introducing into the main action several parallel but independent actions. See *John M. Price and Sons v. Maryland Casualty Co.,* 2nd F.R.D. 408.

We must always keep in mind the important fact that the Supreme Court cannot by these rules of procedure enlarge or extend the jurisdiction of the District Courts. Rule 82 simply declares the limitation placed upon the court by the Constitution.

The provisions of Rule 14 cannot be construed so as to enlarge the constitutional jurisdiction of the District Court.

THE PURPOSE AND INTENT OF THE RULE

The purpose of the rule was to permit all claims arising out of the same transaction or occurrence to be heard and determined in the same actions. The purpose and intent of the rule has been stated in the cases decided by both District and Circuit Courts of Appeal.

In *Barkeij v. Don-Lee, Inc.,* 34 Fed. Sup. 874, the court said:

> "The new Federal Rules of Civil Procedure provide for the presentation of numerous claims, and the participation of multiple parties, in a single civil action. The primary object of this new procedural scheme is stated at the outset of it to be 'to secure the just, speedy and inexpensive determination of every action.' (Rule 1) Rule 14, relating to third party practice, substantially provides that a defendant may bring into the action a person not already a party 'who is or may be liable to him * * * for all or part of the plaintiff's claim against him.' It is obvious that the purpose of Rule 14 is to permit a defendant to bring in a third party who is subject to a liability arising out of the claim upon which the suit is based."

In *Axton Fisher Tobacco Co. v. Ziffrin Truck Lines,* 36 Fed. Supp. 777 (affirmed in 126 Fed. (2d) 476), at 779, the court said:

> "We recognize the general principles of third-party practice to be such as to prevent the necessity of trying several related claims in different law suits and to enable them to be all disposed of in one action. In the great majority of cases this would be the result of such procedure."

THE GRANTING OF THE MOTION IS IN THE DISCRETION OF THE COURT

The authorities are in accord in holding that the leave under the rule to bring in a third party is not mandatory, but is in the sound discretion of the court. It will not be applied where it complicates the procedure or causes delay or adds expense to the litigation, although in *Falcone v. New York,* 2 F.R.D. 87, it was held that under Rule 14 the original defendant has an absolute right, when the facts warrant it, to bring in the third party as a defendant. In that case the court held that there was no discretion vested in the court to deny the application when the facts warranted it. From the later cases it appears that it is a matter of the exercise of the sound judicial discretion as to whether or not the third party under the circumstances in the particular case may be brought in as such.

In *General Taxicab Assn. v. O'Shea,* 109 Fed. (2d) 671 (U.S.C.A. for D.C.), the court, in passing upon this point, said:

> "We think there can be no doubt that it was thus intended to make the impleading of third-parties in the Federal practice discretionary with the trial court."

IS A LACK OF DIVERSITY OF CITIZENSHIP BETWEEN A THIRD-PARTY DEFENDANT AND EITHER THE PLAINTIFF OR THE ORIGINAL DEFENDANT A BAR TO GRANTING THE LEAVE?

There has been a divergence of opinion in the decided cases as to whether the federal court has jurisdiction over the claim

asserted by the plaintiff where a third-party is brought in as a defendant, where there is no diversity of citizenship between the third-party defendant on the one hand and the original plaintiff.

The greater weight of authority regards the third party controversy as ancillary and auxiliary to the controversy in the main action and consequently within the jurisdiction of the federal court, if the jurisdictional requirements are satisfied as to the main action. See *Johnson v. River Land Levee Dist.*, 117 Fed. (2d) 711, and *Williams v. Keyes*, 125 Fed. (2d) 208; *Wichita Railroad and Light Co. v. Public Utilities Commission*, 260 U.S. 48, 54; 43 S. Ct. 51, 67 L. Ed. 124.

Where an intervening or subsequently joined party is not an indispensable party, the proceedings as to his interests are usually referred to as ancillary or supplementary, in view of the rule that original jurisdiction of a suit sustains ancillary or supplementary proceedings. See *Stewart v. Dunham*, 115 U.S. 61, 29 L. Ed. 329, 5 S. Ct., 1163, and *Mitchell v. Maurer*, 293 U.S. 237, 57 S. Ct. 161.

In *Lesnik v. Public Industrial Corp.*, 144 Fed. (2d) 968, the Circuit Court of Appeals in discussing this question said, at page 973:

"Since the adoption of the federal rules, it has been recognized that important provisions as to the addition of parties under Rules 13 (counterclaims), 14 (third-party practice), and 24 (intervention) may have limited effect if requirements of federal jurisdiction and venue are necessarily to be applied to all such parties just as though they were being originally sued by the plaintiffs in the actions. These rules are a part of that fundamental tenet of modern procedure that joinder of parties and of claims must be greatly liberalized to provide at least for the effective settlement at one time of all disputes of which parts are already before the court. They should, therefore, receive such favorable construction as is possible, consistent with due recognition of the settled principle that procedural rules cannot be used to extend federal jurisdiction or venue. Rule 82.

"But jurisdiction is not extended by mere devices making possible more complete adjudication of issues in a single case, when based upon jurisdictional principles of long standing, even though the effectiveness of the new devices makes their use more frequent. Cf. Freeman v. Bee Machine Co., 319 U.S. 448, 454, 63 S. Ct. 1146, 87 L. Ed. 1509. Obviously a mere broadening of the content of a single federal action must not be confused with the extension of federal power; otherwise, such recognized steps as the union of law and equity or the free joinder of counterclaims would be dragged into the ambit of jurisdictional prohibitions, while actually they compress and desirably reduce the bulk and amount of federal litigation. Consequently the adding of parties under the rules has been viewed in the light of the ancient and well-established principle that a federal court has 'ancillary' jurisdiction to complete adjudication of inter-related matters where its jurisdiction has once been competently invoked. See cases collected, 1 Moore's Federal Practice 462-470; Dobie and Ladd, Cases on Federal Jurisdiction and Procedure, 1940, 336-346."

In passing, it should be noted that in the footnote on page 976 in the above opinion the court points out that a permissive counter-claim or one unconnected with the transaction out of which the claim sued on arises is not ancilliary and requires independent grounds of jurisdiction. This distinction should be borne in mind in considering in any given case the advisability of adding a third-party defendant.

In a latter case decided June 21, 1945, *Texas Employers Insurance Assn., v. Felt*, 150 Fed. (2d) 27, that court, on the question of effect of diversity of citizenship in third-party actions, said (page 234):

"Diversity of citizenship has been a ground of jurisdiction in the lower federal courts from the foundation of the Government to the present time, but Congress has never undertaken to vest such courts with independent jurisdiction of controversies between citizens of the same state. The jurisdiction of merely local controversies that the federal district courts exercise in cases of removal on the ground of separable controversies is a different class of jurisdiction from that ordinarily defined by the

Constitution and statutes of the United States. It is of a class variously called ancillary, auxiliary, dependent, incidental, or supplementary. It is an extraordinary kind of ancillary jurisdiction in that it arises from an act of Congress expressly conferring it. Under the statute, it exists, not in its own right, but by virtue of its relation to a controversy of which the court is capable of receiving, and has been given, independent jurisdiction under the Constitution. It is analogous to such ancillary jurisdiction as is exercised by the courts by virtue of their inherent powers."

On the same question consideration must be given to the character of the party to be added as a third-party defendant. If the one sought to be added is an indispensable party to the action, then the diversity of citizenship rule cannot be obviated upon the theory that the third-party proceeding is ancillary or auxiliary. *Stewart v. Dunham,* 115 U.S. 61, 29 L. Ed. 329, 5 S. Ct. 1163; *Phelps v. Oaks,* 117 U.S. 236.

An indispensable party is one who not only has an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting his interest. *Brown v. Christman,* 126 Fed. (2d) 625; *Hale v. Campbell,* 127 Fed. (2d) 594.

WHO MAY BE JOINED AS A THIRD-PARTY DEFENDANT

The courts have held, as indicated by some of the cases, that a third-party cannot be joined upon the motion of the defendant, if it is alleged that the third party is solely liable to the plaintiff for the whole of plaintiff's claim. See *Satink v. Holland,* 31 F. Supp. 221; *Brady v. Black Diamond S. S. Co.,* 45 F. Supp. 338; *Whitmire v. Partin,* 2 F.R.D. 83. In one of the cases the court said that this pre-supposes that plaintiff has sued the wrong defendant which, properly speaking, is a defense, as plaintiff cannot recover a judgment against a third-party defendant whom he has not sued.

In *Atlantic Coast Line R. Co. v. U. S. F. and G. Co.,* 52 F Supp. 177 (October, 1943), the court said:

"Rule 14 permits a third party, alleged to be solely or jointly liable, to be brought in without regard to any question of contribution. If a joint judgment is rendered, then, in a state where contribution is not allowed, defendant could not enforce contribution. Thus, the purpose of the rule would have been served by adjudicating plaintiff's claim and barring him from filing another suit against third party on the same claim, and would have done no violence to any state law, because contribution could be enforced or not accordingly as the state law so permitted or not."

Later in the opinion Judge Deaver says:

"From the sources of Rule 14 and the decisions herein cited, it is clear that this rule, like the admiralty rule, 'covers two distinct subjects, the addition of parties defendant to the main cause of action, and the bringing in of a third party for a defendant's remedy over'."

Judge Deaver gave Rule 14 a very liberal construction, and carried into his opinion the application of the admiralty rule as to the joinder of tort-feasors. He observes that under the admiralty rule a joint tort-feasor could be brought in and his liability determined, irrespective of whether the court could enforce contribution (op. p. 185).

It should be noted that this was not an ordinary negligence case, but one brought originally by a railroad company against the surety on a bond of a shipper for the deficit in freight charges alleged to be due from the principal on the bond which was brought into the case as third-party defendant. The third-party defendant filed a counterclaim against plaintiff for damages to shipments.

The case is worth reading as the Judge discusses many cases dealing with Rule 14.

IS THE PLAINTIFF REQUIRED TO AMEND HIS COMPLAINT TO ASSERT HIS CLAIM AGAINST THE THIRD-PARTY DEFENDANT?

This question presents a very interesting problem and the decision upon this point, it seems to me, will determine the practicability of the rule and its value, if any, in negligence cases. The question is, should the plaintiff be compelled against his will to proceed against a third-party defendant? A plaintiff has the right to sue whomso-

ever he pleases. This is a substantive right which should not be taken from him by a rule of practice.

The advisory committee of the Supreme Court of the United States now engaged in the draft of proposed amendments to the rules of civil procedure for the District Courts of the United States submitted (May, 1945) the second preliminary draft of proposed amendments, and therein proposed the amendment of Rule 14 so that it will read as follows:

"RULE 14. THIRD-PARTY PRACTICE.

(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY. Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him OR TO THE PLAINTIFF for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses *to the third party plaintiff's claim* as provided in Rule 12 and his counterclaims *against the third-party plaintiff* and cross-claims against THE PLAINTIFF, THE THIRD-PARTY PLAINTIFF, OR ANY OTHER PARTY *other third-party defendants* as provided in Rule 13. The third-party defendant may assert *against the plaintiff* any defenses which the third-party plaintiff has to the plaintiff's claim. THE THIRD-PARTY DEFENDANT IS BOUND BY THE ADJUDICATION OF THE THIRD-PARTY PLAINTIFF'S LIABILITY TO THE PLAINTIFF, AS WELL AS OF HIS OWN TO THE PLAINTIFF OR TO THE THIRD-PARTY PLAINTIFF. *The third-party defendant may also assert against the plaintiff any claim he has against him which arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.* The plaintiff may AMEND HIS PLEADINGS TO assert against the third-party defendant any claim WHICH THE PLAINTIFF MIGHT HAVE ASSERTED AGAINST THE THIRD-PARTY DEFENDANT HAD HE BEEN JOINED ORIGINALLY AS A DEFENDANT, *he has against him which arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaim and cross-claim as provided in Rule 13.* A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him OR TO THE THIRD-PARTY PLAINTIFF for all or part of the claim made in the action against the third-party defendant."*

Under this proposed amendment, the committee makes the following comment:

"NOTE: The provisions in Rule 14 (a) which relate to the impleading of a third party who is or may be liable to the plaintiff have been deleted by the proposed amendment. It has been held that under Rule 14 (a) the plaintiff need not amend his complaint to state a claim against such third party if he does not wish to do so. *Satink v. Holland Township* (D. N. J., 1940), 31 F. Supp. 229, noted (1940), 88 U. Pa. L. Rev. 751; *Connelly v. Bender* (E. D. Mich., 1941), 36 F. Supp. 368; *Whitmire v. Partin v. Milton* (E. D. Tenn., 1941), 5 Fed. Rules Serv. 14a 513, Case 2; *Crim v. Lumbermens Mutual Casualty Co.* (D. D. C., 1939), 26 F. Supp. 715; *Carbola Chemical Co. Inc. v. Trundle* (S. D. N. Y., 1943), 7 Fed. Rules Serv. 14a 224, Case 1; *Broadway Express, Inc. v. Automobile Ins. Co. of Hartford, Conn. v. Providence Washington Inc. Co.* (N. D. Ohio, 1945), 8 Fed. Rules Serv. 14a 513, Case 3. In *Delano v. Ives* (E. D. Pa., 1941), 40 F. Supp. 672, the court said: '. . . the weight of authority is to the effect that a defendant cannot compel the plaintiff, who has sued him, to sue also a third party whom he does not wish to sue, by tendering in a third party complaint the third party as an additional defendant directly liable to the plaintiff.' Thus

*The portions of the original rule which have been deleted are shown above in capitals, and the additions to the original rule are italicized.

impleader here amounts to no more than a mere offer of a party to the plaintiff, and if he rejects it, the attempt is a time-consuming futility. See *Satink v. Holland Township*, supra; *Malkin v. Arundel Corp.* (D. Md., 1941), 36 F. Supp. 948; also Koenigsberger, *Suggestions for Changes in the Federal Rules of Civil Procedure* (1941), 4 Fed. Rules Serv. 1010. But cf. *Atlantic Coast Line R. Co. v. United States Fidelity and Guaranty Co.* (M.D. Ga., 1943), 53 F. Supp. 177."

Under the proposed amended rule the following procedure is permissible:

(1) Defendant may move to join a third-party defendant liable to him,

(2) Third-party defendant may make his defense to the claim of the original defendant,

(3) Third-party defendant may file counter-claim against original defendant,

(4) Thiry-party defendant may assert against the plaintiff any defenses which the original defendant has to the plaintiff's claim.

(5) Third-party defendant may also assert against the plaintiff any claim he has against him which arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the original defendant,

(6) Plaintiff may assert against the third-party defendant any claim he has against him which arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the original defendant, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter-claim as provided in Rule 13,

(7) Third-party defendant may proceed against any person not a party to the action who may be liable to him for all or part of the claim made in the action against him.

I have not attempted to write a comprehensive paper on this subject, but simply to point out a few of the important features of Rule 14 as it now stands and the changes contemplated by the proposed amended rule.

Sleep As a Defense

By L. J. Carey
Detroit, Mich.

A FEW weeks ago, according to press reports, Eleanor Roosevelt, the former First Lady of the Land, while driving along the Sawmill River Frontway, dozed off at the wheel of her car and wound up in a triple head-on collision in which she and four others were injured. This accident happened at 4:45 in the afternoon as she was driving into New York City from her Hyde Park home, and as her car crossed over to the left-hand side of the middle line of the highway, it collided with the car coming in the opposite direction and this collision involved the third car in the affair.

It is not difficult to picture a similar situation in which one of our members, on his way to attend this convention, might be involved in an analogous situation. It could be pictured thus: the member had with him, his wife, another attorney from the same vicinity and his wife. In the afternoon, while driving along the highway, this member became sleepy, failed to negotiate a turn in the road; his car continued on in its straight path until it ran off the highway into a telephone pole which crashed down on top of the car, injuring the two guests in the car. There were rumors that the two couples had stopped at a hotel along the highway for the previous night. They had engaged in somewhat of a celebration and partook of considerable liquid beverages and had obtained very little sleep. The guest and his wife, abandoning their safety to the driver's care, were both asleep in the back seat of the car at the time of the accident. There were additional rumors that some time previous to the accident another col-

lision had been avoided by the driver being awakened just in time.

The first case is an actuality, the second one a very reasonable possibility. The first case, undoubtedly, has been reported to an insurance company which is perhaps represented by Claims Counsel at this meeting, and perhaps will be referred for trial to some one of you trial Counsel here today. But, whether it is the actual case or the hypothetical problem, sooner of later the question will be presented to you for your opinion as to whether it is or is not negligence to go to sleep while driving on the highway and under what circumstances liability can likely be avoided.

What will be your answer, and what will be your instructions to the claim and investigation department of the insurance carrier for the accumulation of the necessary proof to sustain your position? Which one of these many rumors will, if substantiated, produce the evidence which will be most favorable for you in the defense of the claim? Will the question of jurisdiction in which the case is being tried make any difference? Just what are the theories of law as they may be applied to sleep as negligence?

Sleep can be and has been very effectively used as a defense in actions other than for the negligent operation of automobiles. For instance, which one of us is there who, on that unhappy and unfortunate "morning after" is frequently unable to account for actions on the night before or the cause of the late hour of arrival at home, and has not turned over on his pillow and used sleep as a defense against the barbed and pointed questions of friend wife?

Of course, I think it is a traditional and, I believe, a very legitimate defense to be used by those attending conventions against the necessity of listening to the uninteresting speeches, papers, addresses and talks imposed upon such audiences. In this instance, your Chairman has used keen foresight and good judgment in so placing your present speaker on this program on an early hour of the morning following the annual banquet. Some can use sleep as a defense against the faint calling of their conscience to the duty of being present here this morning. The balance present can easily succumb to the hypnotic influence of the repetition of the word "sleep" in this address, and again permit "nature's sweet restorer" to rescue them from boredom.

The Bard of Avon has described sleep in such picturesque language that no reference to the subject would be complete without reference to these immortal words:

> "Sleep that knits up the revell'd
> Sleave of care,
> The death of each day's life, sore
> labour's bath,
> Balm of hurt minds, great nature's
> second course,
> Chief nourisher in life's feast."

But as applied to sleep behind the wheel of a car, some wag has said:

> "It not only fails to knit up the
> ravell'd sleeve of care,
> But will quickly unravel it,
> In fact, will take the whole shirt
> right off your back."

In a rather general sense, sleep as a legal defense to actions of negligence in automobile cases falls somewhat in that class of cases in which one is suddenly stricken by an illness, which he had no cause to anticipate, resulting in a loss of consciousness, either momentarily or for an extensive period during which time serious consequences may result. Under such circumstances, negligence is seldom found to exist."[1]

Courts have attempted to apply the reasoning applied in such cases to the circumstances of one's falling asleep and have said, in passing, that a person cannot be held negligent for what he fails to do in operating an automobile after he has involuntarily fallen asleep any more than he could be so held after he had suffered a stroke of paralysis or been stricken suddenly blind, for the reason that failure to exercise care and caution presupposes that the person sought to be chargeable is capable of understanding and perception.[2] This statement, while true and frequently quoted, is actually of no real application and value to the law applying to sleep cases, for the rule is that it is the negligent act of permitting one's self to doze

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[1]Cohan v. Petty, 65 Fed. (2d) 20.

[2]Diamond State Telephone Co. v. Hunter, 21 Atl. 286; Steele v. Lackey, 177 Atl. 309.

or sleep rather than what happens during sleep that constitutes the negligence.

In a leading case, and one frequently cited, the court said the question must be: Was the defendant negligent in permitting himself to fall asleep? The defendant argued that no man can tell when sleep will fall upon him. After quoting from a medical text-book, the court said: "Sleep in such a situation does not come upon one unawares, and, by watching for indications of its approach or heeding circumstances which are likely to bring it about, one may either ward if off or cease an activity capable of danger to himself or to others. There are few ordinary agencies so fraught with danger to life and property as an automobile proceeding upon the highway freed of the direction of a conscious mind, and, because this is so, reasonable care to avoid such a danger requires very great care." . . . "In any ordinary case, one cannot go to sleep while driving an automobile without having relaxed the vigilance which the law requires, without having been negligent. It lies within one's own control to keep awake or cease from driving."[3]

Furthermore, this case laid down the basic rule, reiterated in a number of cases with respect to automobiles, that the mere fact of an individual going to sleep while driving is a proper basis for an inference of negligence sufficient to make out a prima facie case and sufficient for a recovery if no circumstances tending to excuse or justify the driver's conduct are proven. The reason for the rule lies in the language quoted above. Ordinarily reasonable men in the conduct of their affairs in this modern age know as a matter of common knowledge that the operation of a motor vehicle requires the exercise of a certain degree of vigilance and the mere fact that one has fallen asleep while at the wheel brings one inevitably to the conclusion, in the absence of other facts to the contrary, that the driver relaxed his vigilance to the point where he may be said to have been negligent. The inference, however, is not a conclusive presumption and it stands only so long as it is uncontradicted by other facts. Thus, once a plaintiff has established the mere fact that the defendant was asleep at the wheel, he has for the time being made out a prima facie case, but once defendant comes forward with evidence to rebut that inference, the burden of proof still rests on plaintiff to prove actionable negligence and to sustain the burden of proof.[4]

In using sleep as a defense, we should consider under what circumstances and to what extent it operates, first, to relieve a driver of responsibility for his ordinary negligence as in the instances of claims by so-called third party plaintiffs (the owners or passengers of other cars, or owners of damaged roadside property), second, to relieve a host of liability to his guest for gross negligence usually under the provisions of a state guest statute, and, third, how the sleep of the guest may operate as a defense under claims of contributory negligence or assumption of risk.

The defense of a case involving a sleeping driver on the basis of ordinary negligence, that is, in actions brought by third parties, so-called, presents a most difficult problem. A search of the cases in which recovery was satisfactorily resisted in such instances failed to develop anything worthy of note. It would appear that under such circumstances, it would be far more advisable if your defendant driver fainted at the wheel, or lost consciousness from almost any other cause than that of merely falling to sleep. The one case discovered in which the defendant had some success was one in which the driver had worked all day and was visiting friends until 3:45 in the morning and on returning home at 4:00 a.m., had an accident in which he ran off the road and struck the Telegraph Company's pole. He contended that at the time he was not sleepy or drowsy, that he was mentally alert immediately before the accident, that he had not been drinking, and that his falling to sleep was involuntary and without warning. The case was submitted to the jury which disagreed. From the denial of a verdict at the close of the proofs, plaintiff appealed, claiming that the presumption of negligence was not rebutted by defendant's testimony. The court held that de-

[3]Bushnell v. Bushnell, 131 Atl. (Conn.) 432.

[4]Bushnell v. Bushnell, 131 Atl. (Conn.) 342; Carlson v. Connecticut Co., 712 (Conn.) (A) 646; Brownell v. Freedman 6 P (2) 1115, Ariz.; Barnosky v. Graff, (1944), 38 A (2) 35; Whidden v. Malone (1929), 134 So. (Ala.) 516; Baird v. Baird, 28 S.E. 225, 5 A. M. Juris. 605, ⁋ Automobiles 179.

fendant's falling asleep raised an inference of negligence, but that it was not a conclusive presumption. The court stated that the defendant had not by positive or direct testimony accounted for the cause of his conduct, yet, he had established, if acceptable to the jury, facts that could sufficiently rebut the presumption of negligence.[5] Therefore, we have this one case of simple negligence which resulted favorably for defendant, at least temporarily. We could justifably speculate that a different result might obtain if plaintiff's attorney had for his client—a weeping widow, or a seriously injured but attractive young lady rather than the apparently affluent owner of a stark and inanimate telegraph pole.

In the field of law covering the liability of a host to a gratuitous passenger or guest, defendants have generally been far more successfsul than in the cases of ordinary negligence. The basis of recovery varies to some degree in the 48 states. In a large majority of the states the right of recovery is governed by the specific provisions of a state host and guest statute. In other states the law covering this relationship has been established by decision of the courts, usually somewhat along the general trend of the language of guest statutes, although less stringent in application, and in some states, such as, Arizona, the law of simple negligence alone applies. Under such state statutes and under most judicial rulings, however, it can generally be said that the host is liable only when his actions constitute gross negligence. This gross negligence has been variously defined. Selecting a few of such definitions at random, we find: "willful and wanton misconduct"—as in Michigan and in many other states under guest statutes—"intoxication, willful misconduct or gross negligence" as in California—"reckless misconduct" as in Connecticut, "not to increase the danger which may be anticipated by the guest in entering the car" as in Wisconsin—or, "an utter disregard of the dictates of prudence amounting to complete neglect of the safety of the guest" sometimes spoken of as "great negligence" as in Massachusetts.

In my own State of Michigan, there probably has been as much extended and vigorous litigation on this subject as any state in the country. In a Michigan case,[6] in which our office represented the defendants, the defendant truck driver fell asleep, ran off the road, the truck caught fire and a guest passenger, a young relative whom the driver had taken along, was severely injured. The driver's duties required him to leave Grand Rapids about 3:00 a.m. and drive to a town about forty miles away, get a load of cheese and return to Grand Rapids to meet a six o'clock train. To do this, he had to drive rather rapidly, was unable to take time to sleep along the highway, and on the day before the accident, he was awake from 3:00 a.m. to his bedtime about 10:30 or 11:00 p.m. The driver testified that on this trip as on others, he had left a little sleepy but that he was wide awake and did not shut his eyes at any time, and had full control of his mental processes. There was some evidence contained in a statement given by the driver a year after the accident, that he had felt drowsy at times on this trip and that he would light a cigarette and this would wake him up. He did not know how the accident happened, but, a driver of another car approaching from the opposite direction saw the truck coming in a slightly weaving motion down the highway, then, fail to make the turn and finally strike a telephone pole, and burst into flames.

The court states that assuming that the accident was caused by the defendant falling asleep, he then was guilty of at least ordinary negligence and that the weight of authority is that the mere falling to sleep is not gross negligence. The court took notice of the fact that although the driver had only slept four or five hours on the day before, that he was an experienced driver and accustomed to the routine of this trip, that the testimony disclosed no circumstances tending to make him sleepier than usual, that the drowsy feeling was not different from that on other trips, that it was not due to exhaustion or lack of sleep or long continued driving, that it did not cause a loss of consciousness or diminution of his faculties. The court held there was no gross negligence.

In another Michigan case, the Supreme

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[5]Diamond State Telephone Co. v. Hunter, 21 Fed. (2d) 286, a Delaware case.

[6]Boos v. Sauer, (1934), 266 Mich. 230.

Court reversed the trial court where the case was tried without a jury and held the defendant not guilty of wanton and willful misconduct after he had fallen asleep, driven on the wrong side of the highway and into collision with an approaching car, injuring his guest. The evidence disclosed that the parties to the action were keeping company and they had driven to another town to visit friends, that on the return trip at one o'clock in the morning, the guest fell asleep shortly after they left the town and the defendant, who felt drowsy, stopped the car, got out, walked about and smoked a cigarette, and then feeling refreshed, got into his car and continued driving. He claimed he fell asleep without warning. The court said that when he first felt drowsy, he heeded the warning, stopped his car, took measures to refresh himself and after resuming his driving, he was overcome by sleep without warning. This, the court said, did not constitute wanton and willful misconduct, though he was guilty of negligence. This term, the court said, as employed in the Guest Act differs in kind and not merely in degree from ordinary actionable neglifence for the term carries more than a "vituperative epithet."[7]

In still another case, the driver, a short time before the accident, had fallen asleep at the wheel and a prior accident at that time had been averted only by the guest's arousing him. He then continued to drive with such previous knowledge of drowsiness. The court found, nevertheless, that there was no willful and wanton misconduct and referred particularly to that portion of plaintiff's testimony in which she claims that on the first occasion she shouted, whereupon the driver brought the car back on the highway, and remarked that he had fallen asleep. She then suggested that if he was sleepy to let her drive or else park the car and take a nap and wait until he was rested before driving any further. He replied that he was all right, that he could do his driving, but that if he got sleepy, he would park the car and take a nap. The court poses the question as to whether this first drowsiness was such a warning as to constitute further driving by him without rest, an act disclosing a willful and wanton disregard of the consequences. In assuming that query, the court held that judging from the driver's expressed state of mind relative to his ability to continue to drive and plaintiff's acquiescence therein, it could not be found that his further driving constituted a conscious and reckless disregard of the consequences to plaintiff. Here is a vague indication of some indefinite combination of a lack of willfulness of the defendant and a possible assumption of risk by the guest.[8] This case stands apart from instances where the danger was recognized by guests, the attention of the driver called to it, protest made, request for discontinuance or right to leave the vehicle refused, and the anticipated result, by reason of continued recklessness, realized. The type of case which the court was using as an example of the distinction was one in which the driver, returning to the City of Detroit late at night, nearly struck a safety zone and the occupants of the car remonstrated with him about his drowsiness, asked him not to drive further, yet, disregarding their request, he deliberately continued on and a short time later actually struck another safety zone, injuring his guests.[9]

In California, the court attempted to make a distinction based upon the facts in each case, and in the Cooper case held that it was not gross negligence under the California rule. In that case, the driver, a 20 year old boy had been up 19 hours prior to the accident, had driven two hundred miles that day, had been to a football game, and on his way home had taken a ferry across San Francisco Bay, at which time he got out of the car and walked around. On leaving the ferry and when asked if he was sleepy, he had said "No." The testimony also showed that he had had the window down and the cool air was refreshing and that he had no warning of the sleep coming upon him.[10] This case was distinguished from another case[11] where the defendant was drowsy and held guilty of gross negligence, where there was an absence of any such testimony with reference to the steps that had been taken to freshen the driver and his expressed statement was to the effect that he felt drowsy.

From the facts in these and other cases,

[7]Perkins v. Roberts, (1935), 272 Mich. 545.

[8]Wismer v. Marx, (1939), 289 Mich. 381.

[9]Mancer v. Eder, 263 Mich. 107.

[10]Cooper v. Kellogg, (Calif.) (1935), 42 P. (2) 59.

[11]Stott v. Blickle, 220 Calif. 225, 30 P. (2) 392.

it would seem important that you establish one of two lines of reasoning and argument to justify defendant's position. One, that he had no prior symptoms or premonition of any kind that he was to be overcome by sleep. This must be substantiated by established facts showing that for a long period prior to the happening of this accident there was nothing in his activities which would have given him occasion to believe that he might be overcome by sleep. Inasmuch as lack of sleep and exhaustion are commonly known to be the causes of one's falling asleep, these together with drinking and other acts should be negatived in the testimony. Two, the other line of argument or reasoning which may be applied is that the defendant had a warning, either by a previous nodding or drowsiness, a near escape from an accident or some other circumstances indicating that he was sleepy, that he, thereupon took steps to overcome this condition by stopping for coffee, geting out and walking around, washing his face, smoking cigarettes, or other acts which normally would tend to freshen and awaken one feeling himself overcome by sleep.

Lastly, the fact that a passenger or guest permitted himself to fall asleep in a moving vehicle may become a defense in accidents where the sleep of the driver may or may not be involved also. A guest passenger in an automobile, while not actively participating in the operation of the car, nevertheless has a duty to look out for his own safety and it may be possible to establish the sleep of a guest passenger as negligence contributing towards the accident or as an assumption of risk on his part.

The familiar defense of contributory negligence is not always available as against a host. In those states where gross negligence has been defined by the courts as being synonymous with willful or wanton misconduct, a mere showing of negligence on the part of the plaintiff does not ordinarily defeat recovery because as was said in a Michigan case: "to the charge of willfulness and wantonness, contributory negligence is, of course, no defense, for we are no longer in the field of negligence."[32]

Therefore, in states where plaintiff has the more difficult task of proving willfulness and wantonness, he is favored by not being subject to the defense of contributory negligence. On the other hand, in the states where a defendant does not have the advantage of the defense of willfulness and wantonness, there is the advantage of the defense of contributory negligence.

We must also consider the availability of the doctrine of assumption of risk. While originally confined to cases of master and servant or cases involving a contract relationship, it is now being applied to cases involving tort liability and to automobile guest cases of this sort. All too frequently this doctrine has been overlooked.

It may be distinguished from contributory negligence as being a positive and voluntary act in the face of known circumstances as opposed to mere neglect or lack of care. It is venturous rather than passive. Mere carelessness in regard to a situation is not the same as a deliberate choice in respect thereto.[33]

The courts themselves, however, have not been too clear as to which theory they were following when permitting a defense based upon a guest's sleeping.

In the Oppenheim case, a Massachusetts case, the plaintiff guest was asleep in the rear seat of his host's automobile when his host also fell asleep and ran off the road. The accident happened at about 4:00 a.m. and the two of them had been driving since 5:00 p.m. the day before. In denying plaintiff recovery on the announced ground that plaintiff was contributorily negligent as a matter of law, the court also used some language which indicated that it felt that plaintiff realized the inherent dangers of the situation and had voluntarily assumed the risk.[34]

The Oppenheim case is an older case and the trend of the more recent decisions seems to be to the effect that a successful defense may be interposed as a question of fact to the jury on the basis of either contributory negligence, if the circumstances show a lack of care, or on the basis of assumption of risk, if there is a knowledge of incompetence of the driver.

In a New York case, the court stated what would appear to be a more modern

[32]Finkler v. Zimmer, 258 Mich. 336.

[33]Indiana Natural Gas and Oil Co. v. O'Brien, 160 Ind. 266; White v. McVicker, 246 N.W. (Iowa) 385; Schwab v. Martin, 279 N.W. (Wisc.) 699.

[34]Oppenheim v. Borkin (1927), 262 Mass. 281, 159 N.E. 628.

outlook when it said, "In the last analysis the rule governing a guest riding in an automobile is that he should conduct himself as an ordinary prudent person would under like circumstances. * * *" "Who is to answer that question, the court or the jury? We believe that it is for the jury to determine. * * * To decide as a matter of law that if a guest under circumstances, like those in this case, should go to sleep in an automobile, he would then be guilty of contributory negligence, would be to disregard realities and situations growing out of modern conditions."[8]

The circumstances in which the sleep of the guest has been successfully interposed as a defense are not great although many cases can be read in which the defense was raised and the court permitted it to go to the jury. Furthermore, the courts have defined the elements necessary to be shown by stating that for the defense to be applicable, the guest himself must have *first* had an opportunity to know of a threatened danger and, *second*, an opportunity to give warning or to assist in avoiding the accident. In a Pennsylvania case, the court, finding no contributory negligence on the part of the plaintiff, in passing said: "That a guest may occasionally go to sleep is a matter of common experience * * * (and) it must now be regarded as settled that the mere fact of sleeping does not as a matter of law, convict a guest in an automobile of negligence." "This rule is based on common sense. To require a guest to be always awake and alert to take part in driving an automobile would have a tendency to destroy the efficiency of the driver. As a general rule, his mind is fixed on his work, and there is no more exasperating experience than to have his car driven from the back seat."[9]

Similarly in Wisconsin the courts have refined the rule as to contributory negligence by stating that some causal connection would have to be shown between the fact of the plaintiff's sleeping and the collision arising out of the host's negligence, on the theory that even if plaintiff had been awake, it did not necessarily follow that plaintiff would have had an opportunity in the exercise of care to take such action as would have avoided the accident."

But although the rule of contributory negligence seems to have been diluted in cases involving sleep, the doctrine of the assumption of risk seems to have been elaborated. Thus, in a Connecticut case, involving a sleeping guest, the defense of assumption of risk was specifically raised and recognized by the court as a proper defense but held to be a question for the jury."[10]

In two New York cases, while the court used the language of contributory negligence, it nevertheless indicates a conscious or unconscious adoption by the court of the theory of an assumption of risk."[11] The plaintiff and defendant had gone on a trip into the mountains and as they were returning, their car stalled at the top of a hill. Plaintiff stood guard to protect the vehicle from approaching traffic throughout the night and in the morning he and the defendant pushed the car until it started to roll, both intending to coast down the mountain until they reached a service station. The plaintiff jumped into the back seat and after his night long vigil, immediately fell asleep. In denying him recovery for an accident which subsequently occurred when plaintiff's driver failed to make a turn, the court said: "Plaintiff was familiar with the road and was aware that the driver intended to coast down the hill. He did not protest. With the knowledge of these facts and without taking a single precaution for his own protection, plaintiff went to sleep, relying upon the ability of the driver to bring the car safely to the bottom of the hill. The jury properly found that this was a contributorily negligent thing to do."

When an accident is caused by the sleep of the driver, what conclusions can we draw as to the defense of these cases?

When faced with the claim of a third party claimant, where recovery is based upon simple negligence, the mere proof of the act of falling asleep at the wheel will raise an inference of negligence. Defense of such a case will depend upon explaining or justifying the act to the satis-

[8]Nelson v. Nyghen, 259 N.Y. 51.
[9]Frank v. Markey (Penn.) (1934) 173 A. 186.
[10]Suschnick v. Underwriters Casualty Co. (1933) (Wisc.) 248 N.W. 477; Schmidt v. Luethner (1929) 199 Wisconsin 567.
[11]Freedman v. Horowitz (1933) 116 Conn. 283.
[12]Parker v. Helfert (1931), 252 N.Y. 535.

faction of the jury, thus overcoming the inference. The scarcity of defendant's verdicts would indicate the difficulty encountered in presenting evidence sufficiently convincing to justify appeal from an adverse verdict.

In cases involving the host and guest relationship, any general conclusion is necessarily narrowed by the jurisdictional problem. In those states where gross negligence has been construed to include the element of willfulness or wantonness, it seems fairly clear that the proof of falling asleep, in and of itself, does not justify an inference of gross negligence. In those states allowing recovery to a guest for less than willfulness or wantonness, this may also be true. But, whatever the inference, a successful rebuttal has been accomplished in many decided cases by two distinct and separate approaches. One, by a showing that the driver was previously aware of the fact that he was drowsy or sleepy, but, that following such knowledge, he took definite means to refresh himself so that the drowsiness would not again occur. Under such circumstances, even though subsequently sleep overcomes him, the inference of negligence has been successfully rebutted. Two, to establish by evidence that the driver had no forewarning of the approach of sleep and had no reason to anticipate such an event, there being no lack of sleep, drinking of intoxicating liquors, fatigue, exhaustion, or other reason to cause him to fall alseep.

Finally, as to the sleeping guests, the cases indicate that a defense based upon the rather nebulous theory of contributory negligence, so frequently inapplicable, and more firmly based on the defense of assumption of risk, has shown a new trend based based upon modern customs. The common experiences of today, in which people frequently take trips together with some of the passengers sleeping while another drives, has, taken in conjunction with the common use of automobiles as a means of transportation and other factors, caused a change in the application of this defense. It would seem that today a sleeping guest would seldom be held guilty of either contributory negligence or assumption of risk unless there were circumstances indicating that the guest knew or should have known, before he abandoned himself to the arms of Morpheus, that the driver was incompetent, intoxicated, exhausted, sleepy, or that the equipment was either defective in itself or was to be operated under conditions which produced extra hazards than those ordinarily encountered upon the highway.

An insurance man, even though a lawyer, could hardly leave this subject on such a legalistic tone. Today, we have our national safety campaigns, each one confined to some specific phase of highway hazards with the accompanying slogan to drive home the message of safe driving. Equipment campaigns with slogans of "Check Your Brakes" or "Check Your Lights"—Campaigns against drunk driving—slogans of "Speed The Killer," or "Take It Easy," all aimed at predominant causes of accidents, should be implemented with campaigns against the hazards of sleep. The inherent peril of two vehicles, with combined weights running into tons, being hurled at each other at combined speeds of from 100 to 150 miles per hour, the necessity of whizzing past each other frequently with only inches to spare, impresses all of us with the necessity of being awake and wide awake behind the wheel. Perhaps, we individually can do something to keep "Dopey the Dozer" off the highway.

Of course, it may well be that in the world of tomorrow when atom powered automobiles go sliding along the highway, they will be controlled by radar or remote radio control, so that they will maneuver past and around each other without harm. Until that day comes let's "nip of the nectar" at home, let's do our dozing at the fireplace and our sleeping in bed—let's not be caught napping.

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"NUREMBERG TRIALS"

By Willis Smith
Raleigh, N. C.

I DON'T know that you would call what I am going to say an address or not because I haven't prepared it in the form of an address. Bill asked me to talk to you and tell you something about my observations and experiences and I am glad to do that for whatever it may be worth.

I notice with interest that the subject of the paper that was to have been given is entitled, "Sleep as a Defense." I don't

know if that is an invitation for you to go ahead and sleep or not; anyhow, I will take it that way. (Laughter).

I am going to talk to you a few minutes and I hope that I won't forget to look at my watch. I have been known to forget that the watch is there.

Before I begin, let me thank you members of this Association for the excellent cooperation I have had. You did me the honor some years ago to elect me your President, and I set a precedent of holding office for two years. At that time it was the vogue in America to hold office for more than one term, even two terms. I thought I was safe and secure in that tradition, but along comes Bill Baylor and rivals me and says that he has been President for two years also. I don't know of anyone I would rather have than Bill, so it is all right. I am glad to be here and tell all of you that I have enjoyed the cooperation of all of you men in the American Bar Association.

Those in the American Bar seem to think that the American Bar has been turned over to the I.A.I.C. because almost all of our Board of Governors are members of this Association. We have a great many men who are members, and a good many of our committeemen are members. I happened to appoint Oscar Brown to a particular job. Everytime you turned around, he had another job. One of the men asked, "Why did you appoint this man Brown to five different jobs?"

I said, "I appointed him to one job. The other men saw what a good man he was and they began to apportion work out and give him other jobs."

May I say that every one of these men who have taken part in the work of the American Bar this year have performed in such a manner that you and I as members of this Association can well be proud of their achievement.

As most of you know, I went to Europe as a representative of the American Bar Association on invitation from the United States Chief of Counsel. I traveled under War Department orders, for without those orders it would be well nigh impossible for any one to travel in Europe as extensively as I did. It isn't always easy but it was made very much easier by my having an A.G.O. card and having the sponsorship of the Army behind me.

Of course, being the President of the American Bar Association, I was received in a great many places that otherwise I would never had had a chance to get into or see. As most of you know, most of the people of Europe regard lawyers greater than they do in this country. I think they have a greater respect for law and lawyers generally. That is due to the fact that probably the European lawyer is more learned when he begins practicing law, and there are fewer of them. Dearness and scarcity always places the value on everything. The lawyers are regarded very highly in the communities in which they live and by the people of the various nations.

They took us—Mr. Gregory, Chairman of the House of Delegates—and gave us an opportunity to see what was going on. They entertained us most lavishly. We went on the Queen Mary and landed at South Hampton. We were in London for several days. That was in March when it was rather cold. I thought I was going to freeze to death in England; it was terribly cold. There wasn't much food either. We talk a great deal about the good that we have done to the people of the world. As far as I am concerned, I feel a greater respect for and interest in the English than I ever felt before because I saw what they had gone through and I wondered whether or not the people of America could have taken it as the English have taken it.

Building after building was razed and walls were merely standing. I don't know if there is any evidence of divine approval, but it seems that the court buildings had suffered undue destruction. There were still a few of the buildings standing. The law courts themselves were not damaged, but two ends of the court were completely destroyed. The old Temple Church which was one of the show places was almost completely destroyed, except the walls were still standing. Around that church are the graves of distinguished men you and I have read of in literature.

You can stand and see just acres and acres of complete desolation. I saw trees growing out of places in which lawyers once had their offices. The trees were two and three inches in diameter, so they had been there for a long time. There was a great deal of damage in sections of London that could ill afford it. In poorer sections,

people were completely wiped out. That was true in the area of St. Paul's Cathedral. One bomb went through the transepts and did great damage, although the building itself was not destroyed.

All around the English countryside, from South Hampton up to London and other sections which I visited, you would see the evidences of the terrible destruction. Mind you, they had to go through this winter after winter with the cold, fog, and penetrating dampness of that country, and with little or no heat.

We stopped at the Grosvenor House, one of the finest hotels of London, and they carried on in great style as far as the service of things were concerned, but they had little food and practically no heat. I couldn't help but feel that the English people are people of great stability to go through that without any more disturbance than they had in England. I doubt very much if the people in America could have gone through what they went through.

While we were there some of the Lord Chancellors had us for dinner in the Middle Temple. Most of the building had been damaged. I found them carrying on in good humor. I remember one day when we were lunching in the Middle Temple, the Lord Chancellor was telling me about some of the experiences. "We learned how to handle the bombs, and we got so that we didn't worry too much about them. We could tell about where they were, but when these cussed "doodle bugs" began to come over, you couldn't tell where they were coming from or where they were going. If we heard one coming, we would all go under the table to be protected from the possibility of flying fragments of glass. One day we had some lawyers and judges sitting around the table with us and we heard this screaming of an approaching bomb. Everyone immediately went under the table. When the all-clear was sounded, we crawled out and looked around to see if every one was there. They asked where Lord So-and-So was, one of the English judges who wore a goatee. We looked around and couldn't find him, but then we saw him coming out from under the table with one of the waitresses." (Laughter).

They told many stories on one another and seemed to be taking things in their stride.

The Lord Chancellors had dinner for us in the House of Lords. When I got to England, I found an invitation for dinner waiting for us. Of course, I didn't know anybody in the House of Lords up to that time. When Sir Norman Burkett's secretary called me and gave me the invitation, I gulped a couple of times but tried to act nonchalant, as it were, and accepted the invitation. I soon found out that I wasn't the only ignorant lawyer; I didn't know that the Lord Chancellors lived in the House of Lords. So I will pass along that information to you.

I came away with the feeling, not only on that visit but the second visit, that the English were really carrying on and that they were using what we were sending them to good account. I know that sometimes the English irritate us because they out-trade us. We think they are stiff and severe in their manners; yet when I think of some of the blatant, big-talking people who we send to their country, and when I think how they irritate us in this country, I can well understand how the English do not always take all Americans at face value. I am sure that there isn't a man here who wouldn't be received graciously by the British Bar, and generally.

There are many other interesting things which I could tell you, but that isn't the main point.

We went from there to Nuremberg. We went across the Straits and landed at Dieppe. There they gave us one of the greatest demonstrations, in fact I think the greatest reception we had. Dieppe is pretty well shot to pieces. You know the heroic story of the effort to penetrate that city. To our utter surprise they had gotten word that we were coming and the mayor of Dieppe, who is a lawyer, turned out the guard for us. They had a great reception for us at the dock when we landed. We spent a night in a little French hotel. The next day the mayor and his group took us around and showed us the various points of interest, and at high noon, gave a champagne party for us. They carried on in fine style.

May I say that I was particularly pleased with not merely the reception that the French gave us but their attitude toward us and the American GI's. Generally there

is not much gratitute in a lot of people, and, frankly, that is what I expected to find in France. But I found that the French people, those I came in contact with, were very appreciative of what the Americans have done during the war. That was a heartening sign.

From Dieppe we went to Paris, then to Frankfurt, and then to Nuremberg. Of course, when we got to Nuremberg, our main objective was to observe the trial. We did that quite religiously for three weeks. We went to court before it opened at 10 o'clock and stayed all day, except an hour for lunch. Several times I have been asked whether the trials were boisterous. Some people in this country seem to have gotten the idea that the trial at Nuremberg was somewhat similar to the trials which they have read about in places in France where there was a lot of boisterous conduct, but not so in the trial at Nuremberg. I have never seen a more dignified trial anywhere, not excluding Supreme Court of the United States.

The presiding judge was Lord Laurence of England. He is a perfect caricature of the English judges we have seen—a bald head, very dignified, glasses hanging on his nose. After he gets off the bench, he is one of the most genial gentlemen you have ever seen. One night we were at a party which was given for us by Mr. Biddle and Judge Parker. There was a very beautiful young Russian woman dancing with Lord Laurence. A good friend of mine, an assistant attorney general of North Carolina who was spending two or three days with me, went up to him, tapped him on the shoulder, and waltzed off with her. Lord Laurence came back and said, "Is it the custom in your country, when you are dancing with a beautiful woman, for a stranger to come up and tap you on the shoulder?"

I said, "Yes, Sir Jeffery, that is the custom in America. They do it every chance they get: and he's my friend." (Laughter).

Life in Nuremberg has been a severe strain for the men who have been over there. They have had very little recreation. They have had some of these social gatherings at which practically all the groups turn out, and that is where you will see a great many of these people. They seem to get along quite well, but the recreation has been quite restricted as Nuernburg is practically torn apart.

The town is on a hill. The wall around the city is practically demolished. Buildings that were beautiful pieces of architecture are completely destroyed and stand as rubble and ruin. That is true all around the city of Nuremberg. The streets have been cleared fairly well so that automobiles can pass to some extent. Yet a lot of them have debris piled up along the edges and when you get on the side streets, you can't do anything but pick your way through on foot. When you see some of the beautiful residential sections where the wrought iron grille work and brick work are hanging there in ruin, it makes you realize indeed that this time the German people are paying a price, that they have come to realize what war means and what war has meant to other nations. Until this the German people never realized the force and effect of war.

When you see the city of Nuremberg almost destroyed, and then you go on to Berlin and see the same conditions there, and very much the same conditions in Munich and Frankfurt, although not quite as bad, it has quite a depressing effect to begin with. After you have been there a week or two, as we were, you begin to take things for granted.

A lot of people asked what was the disposition of the Germans that I saw? I didn't have close contact with many Germans, but I did with a few. Some of them are sullen in appearance, and some look askance at the American civilians and the Army people, and some won't look at you at all. On the other hand, I did run across a good many Germans who were courteous and very pleasant.

There are a lot of people who are anti-Nazi over there. When we see the movies and pictures of what went on over there, it is hard for us to realize that all the Germans weren't for Hitler. There were hundreds and thousands of those people who did not approve of Hitler any more than we did.

We were billeted in the home of a German industrialist. The mansion stood high on a hill. From the hill you could see chemical factories. I counted 16 smokestacks one afternoon. There had been an old family settled there for many, many years. The lady who had been left in charge was the wife of this German indus-

trialist. She had a very sad expression. Her face showed signs of turmoil, struggle, grief, and horror. She spoke almost every language imaginable. Those people were anti-Nazi. This particular man had been required to join the Nazi party. After a few days acquaintance we found that she was a well-educated woman. She said that her husband had to join or else have his head severed from his body. This particular man was turned out of the Nazi party later, yet those people had to go along or else suffer the consequences.

The trial was a spectacle. There sat before us 21 men, one of the men being tried in absenture, around whose names so much history has been written. We saw Goering, Ribbentrop, Hess—all down the line. When we went in the court they were finishing Goering's cross-examination. Goering is a very learned and smart man. When the Americans captured him he had been quite a dope addict. The people generally regarded him as a clown and buffoon. He isn't at all. He acted sort of clownish by reason of the intake of dope and alcohol. We have that experience in America. But Goering has been cured of the dope habit. He has had all these months to prepare his defense.

The court allowed him to wander far afield in cross-examination for any kind of a law suit. He saw that the court was going to be lenient with him. Instead of requiring him to answer questions yes or no and then explain, he gave short stump speeches every time Justice Jackson asked a question. Some of you may have read the criticism of that cross-examination. Justice Jackson was criticized by some of the newspaper people as not having conducted the type of cross-examination expected. It wasn't his fault. If you read the record of the cross-examination, you will see that Goering made the most damaging admissions that would never do anything but convict him and his associates. What attracted the newspaper people was that Goering would make wisecracks and wise retorts and then go ahead and make speeches on the subject every time a question was asked. After about two or three days of that, the court saw that they must not let this man wander as far afield. Then they began applying the rule as you and I know it, but not as strong as you and I know it. Then the damaging admissions began to be made. He testified at great length. He acknowledged wide responsibility for the Nazi regime and what went on until he got to one subject which Justice Jackson started to question, and that was about the death of the seven American flyers. He was very positive in denying that. He said, "I was a flyer in the last World War. My German boys were flyers. I knew the situation they would have to face and I was never in favor of shooting those American boys. I protested to Hitler and to my associates. I knew that it was a mistake, in the first place from the standpoint of humaneness, and secondly, the policy of it. It would stir up America and England and other nations."

I was inclined to believe that Goering was probably telling the truth. I had a feeling that Goering would not have had those flyers shot for the reasons that he mentioned, but they were shot and that, of course, is history with which you are familiar.

We had a chance to observe the German lawyers. Some one asked me if there weren't cases in which Jews were assigned to defend these German Nazis. There is not a word of truth to that. Of course, there were Jewish boys around who were in the American army. As far as I know there were no Jewish lawyers. They were given a chance to pick out any lawyer in Germany that they wanted and the International Tribunal paid the fees. There were a few of these Germans who refused to employ counsel and the court assigned counsel to them, but not Jewish boys. They assigned German counsel, and there was not a single lawyer, as far as I know and I am sure that is correct, who represented those Nazis who weren't generally German lawyers. They did have a little trouble getting some of the lawyers to serve. There were two groups, the anti-Nazi and Nazi lawyers. They hated, in some cases, to represent this regime by defending these particular defendants to which they had been assigned. You can understand that. Then there were other lawyers who had been Nazi lawyers who didn't want to be put in the position of not knowing what would happen in the future. But altogether, I thought they were getting a very fine defense. Some of the German lawyers are smarter than others. There was Dr.

Dicht, President of the German Bar, one of the outstanding lawyers of Germany; Dr. Stommer and other men, practically all of them carrying a degree.

One of the men, I believe a Dr. Horne, seemed not to understand the system of introducing evidence. It seemed that he didn't know what he was doing or else he was stalling. I had some sympathy for him. He didn't seem to have the understanding of the American and English system of jurisprudence—the trial is more like ours than the French or Russian. I made some inquiry about him. It turned out that he was not at all dumb. It appeared that he was stalling. He spent three years in England, a Rhodes scholar, and speaks English as well as any Englishman can speak it. He was a smart fellow who had the idea that stalling might do some good. After all, that was that many days safe for those men. Then it occurred to some of us that maybe what would happen would be that this man would realize that Judge Parker, Mr. Biddle, Lord Laurence, and Sir Norman Burkett would travel around together and if any two men from the same nation were incapacitated or killed, that was the end of the trial. You can imagine what the people would say if this trial had to be started all over again. When some of the judges realized that, they began to realize that they shouldn't travel around too much together. I don't know if that was the man's idea or not, but that was the only reason that I could ever imagine as to why he was stalling.

You may be sure that the Germans are having far greater representation than they would have afforded any Englishman or American if the tables were reversed. Every lawyer is given a chance to present every part of pertinent evidence that he can present. They have this system of presenting evidence through document books. I wondered what sort of evidence these men were making. It wasn't a question of identification for practically every man in that box could be identified and his connection with some real murder could be traced straight back to the murder or killing. When I heard some of the documents read, I saw that they were defending them upon the ground that they were carrying on for their stated nation as officials of the country would be expected to do. One of the defendants, I believe it was Ribbentrop, said, "Yes, we did do it but we didn't do it for the purpose of waging an aggressive war. We did it because we thought we were going to have to defend Germany against the onslaughts of America and England. In 1936 in a magazine a man said so and so; we read it and interpreted it to mean that we were going to be onslaughted." They took it at face value, and they interpreted it far beyond what they would have been expected to. They were trying to build a case on that. They said that they were defending their country against other countries and they had a right to do that.

Goering, for instance, had no hope of ever escaping so he continued to say and do things that would make him a martyr in the eyes of the Germans in the future.

We were very interested in what Hess would have to say when he went on the stand. He got very nervous and went all to pieces and was taken back to his cell. I never heard him testify.

One of the most despicable men in the group was Streicher. He sat next to Dr. Funk, who had been Minister of Economics. The story was told by one of the attendants that he heard Dr. Funk say to one of the defendants, because there is much cliquism among those men, "I don't know what the allies are going to do or what punishment I am going to have, but I know one thing, they couldn't punish me any more than by making me sit next to Streicher all through this trial."

The lady who I mentioned before told me a story which I haven't seen published. It is an interesting story on the lack of character of this man Streicher who caused as much damage as any one man there. His father had been a fine old school teacher, not widely known but nevertheless a man who was highly respected. Julius Streicher had a lot of trouble with his father, and the father remonstrated with him about some of the things he had done and also about his political theories. The old fellow was a nice old gentleman. They parted company, Julius went his way and the father went his. Finally the old man died, and after he was buried, Julius Streicher came to power. One day he bedecked himself in his finest uniform and medals and marched out to the cemetery where his father had been buried. He stood at the foot of his grave and said,

"You were just a simple German who devoted your life to education. You didn't amount to much in this world. You said that, I, your son, was going to be a failure; that you didn't approve of what I said and did here. You don't amount to much in the history of Germany, but here am I one of the most powerful who will go down in history. You, who lie there dead and cold, never achieved anything at all in this life while I have."

That sort of gives you an idea of the kind of man he was. You can understand why he didn't hate to pursue the Jews relentlessly and tried to do everything he could to exterminate them. On that point they almost succeeded for it is a rare thing to find a Jew in Germany today. According to the estimate, between 5 and 6 million were exterminated in the concentration camps. That, of course, was the greatest system of killing that the world has ever known. The atrocities perpetrated in those camps and the number of people killed is unimaginable. There were over 200 of those camps. We haven't heard about most of them; we have heard of only a few of them. You have heard about Dachau, Mauthausen, and Buchenwald. I visited the Dachau camp twice. On the first visit the general in charge designated a Polish lawyer to take me through and show me the camp because he had been there. He was a very able and interesting man. He showed me the gas chambers where these people were crowded together, 200 at a time. There were peep holes where the executioner could watch the people. When he saw the last struggle, he turned on the ventilators, opened the door, and the German dentists went in and removed the gold from the teeth of the victims. Then they would pile the bodies one on another and burn them. In one building they had all sorts of methods of torture for torturing the human being. Outside were other places where they killed people by the wholesale lot.

As you probably read, some would boast of their efficiency in killing people. For instance, at Dachau when the people were going to be shot, they were to bend over at a certain angle, and then the bodies were moved. Pretty soon the blood accumulated, so somebody had the idea that they should bend over a trench. They had grill work over the trench, the blood would go through the grill work and be carried off.

This particular man told me what was the most dramatic instance I heard while I was there. He was in a hospital with typhus fever. The rumor came that the Americans weren't very far away. He and other inmates prayed day and night that the Americans would get there before their time came either to be gassed or shot. Day after day, and night after night, he would think that they would be here. One day someone smuggled into the hospital a little piece of paper that had reference to the American forces coming. He said that he waited the next day and the Americans didn't arrive, and that night he tried to go to sleep but couldn't. He said that he realized that he had but two or three days before he would be exterminated. Then the next morning he noticed that some of the Germans guards were leaving the hospital. All of a sudden, when he had almost given up, he heard the cry ring out, "The Americans are here!" He described the thrill of the excitement. He said he came out, as did all the patients, sick or well, and made his way out of the door.

I had talked to many of these men about the horribleness of these things, yet I got a clearer picture when I had seen the places where these things had taken place. In Dachau they piled bodies so high that the stench of deteriorating flesh was offensive to people passing on railroad trains. I saw pictures of this, American and German films. The Germans were very efficient in their reports. These bodies were piled so high that the whole countryside was polluted. You would see bulldozers come along and dig trenches, and then you would see the bodies thrown into these trenches and the bulldozers would cover them up. There were just hundreds and thousands of people. I remember in one of these pictures you could see these men dragging the bodies of women through the mud and mire with their hair hanging down, and taking them to the edge of a precipice, by reason of the cutting of the bulldozers, and throw them over. You can realize the horror of it if it were your sister, mother or wife—she might have been a victim of that sort of thing. It is beyond human imagination that one human being could do such things as were done in that

country. I suppose it is the greatest illustration of man's inhumanity to man.

We went to Prague and saw the trial of Karl Hermann Frank. If some of you read my article in the July issue of the American Bar Journal, you will remember the picture shown of the confirmation ceremony. We have a provision in our Constitution about the accused being confronted by his accuser. I don't know where that came from—I know where it came from to start with. In Prague it has been the custom for thousands of years for the accused to be faced by his accuser and by the relatives and victims. This was interesting from the legal standpoint. Frank, of course, was a terrible character. He had murdered Czechs by the thousands. When he was being tried, I was as close to him as I am to the reporter here. He denied certain things of what appeared to be a true story. The court, sitting in a semi-circle, asked Frank to rise and had the witness walk within five paces of Frank. As each faced the other, they were asked to repeat their stories, looking straight into the eyes of one another. That is a test of credibility which the Czechs have used. It was indeed a very dramatic point. Justice Jackson and Mr. Steinhart, the American ambassador, were there. It was quite interesting to see that old ceremony performed there in this court house in Prague.

While there I believe I saw the greatest demonstration given Justice Jackson that I ever saw given to any lawyer in connection with any kind of law suit. We went to the jail where we saw a good many of these Nazis, and when we came out, the word had spread around that Justice Jackson was there. We had gone there for a conference with authorities of Czechoslovakia so there had been nothing in the papers, as far as we know, about Justice Jackson coming. Prague is a city of more than a million people. We got to the court house and started to our car, but it was impossible to get to the car. Thousands of people had gathered. Jackson's name has been spread all over Europe. Finally the police had to come and make an alleyway for us to get through to the car. The people had gotten out American flags in that short space of time. They cheered Justice Jackson all along the road.

You have heard that one of the greatest mediums of exchange in those countries is American cigarettes. You can buy almost anything you wish for two or three cigarettes. One little boy, who had gotten hold of one of these cigarettes, pushed his way through the mass of humanity, came up and reached that one cigarette through the window of the car to Justice Jackson as his token of appreciation in what they regard as a work of deliverance from these people who had practiced so many atrocities on them. It was touching to see how those people treated him. I haven't seen that published anywhere, and, of course, Justice Jackson is too modest to mention it. But those of us who were with him couldn't help but be impressed with the adoration of these people.

We then went out to the village of Lidice. Some of you have heard me tell this story. One of the most impressive things I saw was what was once the village of Lidice. You remember the story of the Czech town where the inhabitants were accused of harboring the assassin of Himmler. It was a little town about 18 miles from Prague. They asked us if we wanted to go out there. We said that we did because we had read and heard of it. It has now become famous in song and story.

We came to a wide open space, and there was a beautiful little brook on each edge with a few trees. There was a sign, "Lidice." There was not a building in sight, not a piece of rock or rubble as big as your fist. That was the village of Lidice. Hitler gave the order that it must be completely destroyed because of the fact that they had been against him and had harbored, as he said, the assassin of Himmler. All the men, as you know, were taken and murdered by the Nazis. Every woman was taken and carried off as a slave to some Nazi camp, and every child that was not murdered or not made a slave was scattered to the four corners of the earth so that he or she could never know his parents or what his life had been. So all life was extinguished.

We saw the German film of the destruction of Lidice. They set fire to the buildings and then blew them up. They sent crews in there and dug up the very foundations. Hitler ordered that it must be completely eradicated from the face of the earth. You can go back there and look at

it today and you will see nothing except the place that the Czechs have fenced off where they have placed the bodies of a few of the victims who had once lived in Lidice. On the top of this hill they have placed a shrine that has become a hallowed spot in that nation. Even as you look at it and think of the terrible sacrifice, you think how easy our life is.

From there we went to Austria. There we had our first real sight of what the Russians were doing. As we started across the Danube, out stepped this little Russian with a tommygun and said that we couldn't go any further. We had expected to drive across the Danube and view the very beautiful drive on the other side, yet we, former allies, were not allowed to cross. I know of a great many instances where planes were fired upon. The few you have heard about weren't all. If you talk to the flyers, you will find that there are many cases when the Russians fired upon them. One day when I was flying with a young fellow from the eastern shore of Maryland, he asked me if I wanted to fly straight to Berlin and take the chance of being shot at or fly the way that the Russians had outlined. I said, "I believe I will let the more adventuresome fly straight; you go around as outlined." (Laughter).

We have put up with all sorts of indignities from the Russians. I feel like I shouldn't be one of any number to stir up any trouble, yet I am thoroughly convinced that they have their own political ideologies and they will go right on if we stand by and let them. Those people look on us as a lot of soft-headed people. You remember, in going to school, the boy who had everything, fine clothes, watch, a lot of money to spend. If he were a good fellow and liberally inclined, he would throw his money right and left and perhaps threw it away on something in which you were interested. Yet you didn't have any respect for him; you thought he was soft-headed. And that is the way they think of us—that is, in central Europe. They give us little credit for what we have done for them. Outside of the British and the French, and not all the French, and some of the Czechs, they think we are soft-hearted and that they can take anything away from us. That, to me, seems to be the danger point. I have been gratified at the stands our State Department has taken lately, yet I don't think they have taken a strong enough stand but they are showing some improvement.

After we came back from Vienna, we went back to listen to more of the trial. They were progressing slowly. There was criticism of the time taken, but you must remember that there, being charged in that dock, are 21 people, charged with the greatest crimes in history. If you and I take the time to study the basis of the trial and read Justice Jackson's brief and opening statement and argument, you will see that there isn't anything very wrong unless you say that there should never be anything such as common law, which, of course, none of us can say. You might just as well say that it was all right for Cain to have killed Abel. You might mention all sorts of instances that all of us recognize as crime and murder. That is what these men are guilty of, either as participants or accessories. After I went over the situation, I didn't have any more worry about that. I did have a little question, but I found out that the reason I didn't understand it was because I hadn't read enough about it.

I hope that I haven't talked too long. I see the watch running around and that my time is up. I enjoyed seeing all of you. I am sure that you may be satisfied that the court at Nuremberg, the lawyers and judges, are conducting themselves in the best traditions of English and American jurisprudence.

Report of Fire and Marine Insurance Committee

R. W. SHACKLEFORD, *Chairman*
Tampa, Fla.

Insurance By Bailees

IT has frequently been stated as a commonplace of the law of property insurance that if any bailee, such as a carrier, warehouseman, or wharfinger, "carries insurance on goods stored with him, the insurance company will be liable for the loss, notwithstanding that, under the storage agreement between the warehouseman and the depositor, the warehouseman is not obligated to the depositor to carry insurance." *United States v. Insurance Co. of N. America,* 65 F. Supp. 401, 406 (W.D. S.C., 1946).

This quotation is fairly representative of a long line of decisions, and is not, as stated, literally correct, although the facts in that case made the result inevitable. It is closer to the truth to say that "the bailee generally, having goods in their possession, may insure them in their own names . . . for the whole value of the goods." 6 Am. Juris. p. 323. But even this phrasing does not convey the whole truth, and because the need for precise expression is so acute in this as in other branches of the law of insurance, your committee desires to call to the attention of the members of the association the true nature of the rule.

Although it had its inception in many earlier cases, the rule has in this country most frequently been justified by the citation of *Home Insurance Co. v. Baltimore Warehouse Co.,* 93 U.S. 527 (1876). Since that decision, it has enjoyed innumerable instances of judicial approval. It remained for the Circuit Court of Appeals of the Seventh Circuit, half a century later, to demonstrate that the stereotyped expression of the doctrine was not adequate, in *Central States Grain Cooperative v. Nashville W. and E. Corp.* 48 F. 2d 138 (C.C.A. 7th, 1931). In that case, the description of the goods covered by the policy was not materially different, and the policy provisions were in most respects indistinguishable from those construed in the *Baltimore Warehouse* case. Yet the Circuit Court characterized the insurance contract in the case before it as one of indemnity only, and consequently held that it did not protect the owners of the goods held in storage against loss.

In view of the rationale of this opinion, it is especially in order to compare the policy provisions in these cases. In the *Baltimore Warehouse* case, the policy obliged the insurer "to make good unto the said assured (warehouse) . . . all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified. . . ."

The description of the goods was contained in the following clause: "The Home Insurance Company . . . do insure Baltimore Warehouse Company against loss or damage . . . on merchandise hazardous or extra hazardous, their own or held by them in trust, or in which they have an interest or liability, contained in" a certain warehouse. The court in that case reasoned that since the description covered all of the goods, the insurer was consequently liable for their entire value.

The *Central States Cooperative* policy bound the company to "indemnify the Warehouse . . . for such loss as might be sustained by reason of damage or destruction of any grain contained in the elevator, whether such grain belonged to the Elevator Corporation, or was held in storage or in trust or for the benefit of any other."

In this case, however, the court held that the clause just quoted "merely refers to the subject-matter upon which the indemnity is to operate, and is in no manner descriptive of the party or parties to whose benefit the indemnity shall inure." 48 F. 2d at 141.

It seems fair to say that the same conclusion might, if the wording of the policy were alone regarded as controlling, have been with equal logic reached in the *Baltimore Warehouse* case.

Let us suppose that a warehouseman undertakes to store certain goods for the owner. Nothing is said in the storage agreement about insurance, and the com-

mon law liability for their safe-keeping is not enlarged in any way. The warehouseman procures a policy which contains the usual sole and unconditional ownership clause, with the following added: "Provided the insured is legally liable therefor, this item shall also cover such merchandise held in trust or on commission, or on joint account with others, or sold but not delivered." A further provision stipulates that the insurer "shall not be liable for loss to * * * property held on storage." The goods are then destroyed by fire; the contract of storage provides that the warehouse is released in advance "from any liability . . . incident to the storage and possession thereof;" there are in fact no circumstances from which liability for the loss can be attributed to the warehouse.

Such was the nature of the contract in *American Eagle Fire Ins. Co. v. Gayle,* 108 F. 2d 116 (C.C.A. 6th, 1939), where the insurance company paid the warehouse receiver the entire amount of his interest, and disclaimed further liability on the ground the contract was one of indemnity merely, citing the provisions just quoted. This contention was rejected by the court on the authority of the *Baltimore Warehouse* case, and the opinion concludes as follows:

> "In the situation here disclosed, and under the terms of the contracts, the subject matter of the insurance was tobacco in storage, and the policies were more than contracts for the indemnification of the receiver. Home Insurance Co. v. Baltimore Warehouse Co., supra. The exemption of the estate from liability to the appellees by the receiver's contract with them cannot avail the insurers, and the policies do not require that the liability of the insured to others in interest be adjudicated. Liverpool & London & Globe Insurance Co. v. Crosby, 6 Cir. 83 F. 2d 647 (1936); National City Bank v. National Security Co., 6 Cir., 58 F. 2d 7 (1932)."

None of the cases cited by the court support the result. The *Baltimore Warehouse* policy had no clause equivalent to the phrase "provided the insured is legally liable therefor," by which the coverage was expressly restricted insofar as it applied to property not owned by the bailee. The *Crosby* case involved an agreement by the bailee to procure insurance for the owner's benefit; and the *National City Bank* case was concerned with an entirely different type of insurance, to wit, an indemnity contract in which the plaintiff bank was insured against "loss" by a surety company, which loss arose as a result of fraud of an officer of the bank.

So far as appears from the opinion, there were no special facts or peculiar doctrine of state law to compel the result, and that result seems clearly to disregard the express intention of the parties. Consequently this case may be regarded as an example of the confusion which has arisen from the loose expression employed on the question.

At least some of the difficulty may be ascribed to the fact that the early controversies turned upon the question of insurable interest. If the bailee had not agreed to assume the liability of an insurer for the return of the goods, and had not agreed to procure insurance thereon, it was logical to argue that his interest went no further than the amount of his lien for storage, freight, or advances; and since he had no legal interest in the excess, and could not suffer from the loss, he had no insurable interest for the full amount. Accordingly, Gow on Marine Insurance (4th ed., 1917, p. 79) contains the statement that a lighterman cannot claim on behalf of the owners of the goods any indemnity from the insurer for causes of loss for which he is not answerable, however the policy may be worded.

It was against this theory that the earlier cases are directed. The English courts had, in the middle of the past century, rejected the contention that the bailee's insurable interest was circumscribed by his liability to the owner: *Waters v. Monarch Fire Assurance Co.,* (Q.B., 1856), 5 E. & B. 870, 119 Eng. Repr. 705; *London and N.W. Ry. Co. v. Glyn,* (Q.B., 1859), E. & E. 652, 120 Eng. Repr. 1054. The same argument failed in the leading case of *Munich Assurance Co. v. Dodwell and Co.,* 128 Fed. 410 (C.C.A. 9th, 1904). In that case the court held the charterer of a ship had an insurable interest in the cargo, and the insurer was liable to the charterer for the general average contribution of all the cargo regardless of the extent of the char-

terer's liability to the owners of the goods.

Of course, the only substantial raison d'etre for the doctrine of insurable interest is to prevent the degeneracy of legitimate policies into mere gambling contracts. It would, therefore, have been most unfortunate if the early cases had adopted the position that no such interest existed. But it is an unwarranted, though frequent, assumption from such decisions that the insurer is liable on such policies for destruction or damage to the goods of the owner, regardless of the intention of the parties.

Perhaps an example of a case where the insurer proceeded on just such a mistaken assumption is the decision in *In re Podolsky*, 115 F. 2d 965 (C.C.A. 3d, 1940). There the insurer paid to the trustee in bankruptcy an adjusted amount, computed, apparently, on the basis of liability for all the loss without limiting that amount to the extent of the trustee's interest in the goods. The owners thereupon sought to recover the excess, but were denied any share of the proceeds, on the ground that the parties to the policy contract had not in fact intended to benefit the owners, but had intended only to protect the bankrupt's interest; and that the mistaken payment, whatever equities it created between the insured and the company, could not benefit the owners of the goods in the absence of such an intention. Of course, if the company were in fact liable for the entire value, the assured would hold the excess "in trust" for the owners: *Baltimore Warehouse* case, supra; *American Fabrics Co. v. Benedict*, 1938 A.M.C. 254 (N. Y. Sup. Ct. 1937).

Coming before the Circuit Court as it did on stipulated facts, the *Podolsky* case may have contained elements, not brought to the attention of the court, which made the insurer liable in fact; but whether the error was made by the company or by counsel for the bailors in selecting the facts for stipulation, it is instructive as another instance of occasional misapprehension of the true rule.

After an extensive though by no means exhaustive study of the cases, your committee has come to the conclusion that the result will always, as it must in every case of contract, be primarily guided by the intention of the parties, and that the fundamental inquiry must be whether the parties, or either of them at least, intended to confer upon the owner the benefit of the insurance.

It has already been pointed out, in the comparison of the *Baltimore Warehouse* and *Central States Grain Cooperative* cases, that such intention is not to be inferred from a description of the goods as "all those within a certain warehouse, their own or held by them in trust." Accordingly, where the policy describes goods as cargo aboard a certain ship (*Willamette Navigation Co. v. Hartford Fire Ins. Co.*, 287 Fed. 464 (C.C.A. 9th, 1923)) the intention to benefit the owner of the cargo is not necessarily made out.

Equally unwarranted would be such an assumption based on the amount of coverage. On the latter point, the opinion of Bowen, L. J., in *Castellain v. Preston*, (1881), 11 Q.B.D. 380 (C.A.), is instructive: "A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy." He then suggested the case of a mortgagee who loaned 500 pounds on a ship, which has a total value of 10,000 pounds. If he insures for 10,000, "meaning only to cover his own interest, and not the interest of anybody besides," it is an over insurance, "and to treat it in any other way would be to make a marine policy not a contract of indemnity, but a wager, a speculation for gain." (p. 398).

How shall the intention be proved? If we go beyond the language of the decisions to analyze the facts involved, it would seem that the following conclusions will obtain:

The simplest case is that where the bailee agrees for a consideration to procure insurance: *California Ins. Co. v. Union Compress Co.*, 133 U.S. 387 (1890). In such cases, the bailee would be liable for breach of his contract to insure, so that his intention could hardly be the subject of doubt. In the same class might be placed the cases where the custodian represented to the purchasers that they were in fact covered, under circumstances that would have ren-

dered it peculiarly inconvenient for the owners to procure their own insurance prior to removing the goods from the premises; *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606 (1871).

Or the bailee may insure in his own name and "on account of whom it may concern," *Hooper v. Robinson*, 98 U.S. 528 (1878); *Phoenix Ins. Co. v. Erie Trans. Co.*, 117 U.S. 312 (1886). Or in the name of "each and all owners," *Pennefeather v. Baltimore Steam Packet Co.*, 58 Fed. 481 (D. Md., 1893). Or in the name of the insured "as well in his or their own name as for and in the name and names of all and every other person or persons to whom the subject matter of this policy does, may, or shall appertain in part or in all," *Munich Assurance Co. v. Dodwell and Co.*, supra. Or where the policy is obtained by a charterer on the hull of a vessel, in the name of the charterer, "on account of steam-boat Charleston and owner," loss payable however to charterer, *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S.E. 777 (1889).

The ratio of the bailee's interest to the whole value might also be deemed significant, as where the bailee's lien for advances covers by far the larger portion of the value of the property: *Baltimore Warehouse* case, supra.

The intention to benefit the owners need not be disclosed to insurer at the time of the contract: *Rayner v. Preston*, (1881), 18 Ch. D.1, 10 (C.A.).

Other cases, however show that none of these factors may be regarded as conclusive. Thus, in a recent case, involving fire insurance on a building, the court held that the use of the phrase, "for whom it may concern" was not necessarily indicative of an intention to benefit the owner of the reversion of the real estate: *Board of Education v. Winding Gulf Collieries*, 152 F. 2d 383 (C.C.A. 4th, 1945), *cert. denied*, 90 L. Ed. 943 (1946), previously reported by your committee at XII Ins. Counsel Journal No. 3 (July, 1945), p. 20; see also *De Bolle v. Pennsylvania Ins. Co.*, 4 Whart. 68 (Pa., 1839), and *New Orleans and South America S.S. Co. v. W. R. Grace and Co.*, 26 F. 2d 967, 1928 A.M.C. 1074 (C.C.A. 2d), *cert. denied*, 278 U.S. 636 (1928).

In the light of the foregoing discussion, we may now examine the question, why was the *Central States Grain Cooperative* case decided in the company's favor? The court referred to the following facts: the owners had procured their own insurance; the warehouse was not obliged to effect the insurance; the warehouse apparently was not entitled to any storage charges, and had advanced no moneys on the security of the grain. (Compare the *Baltimore Warehouse* case where the warehouse had advanced over 90 per cent of the value of the goods on the security thereof). Thus the court seems fully justified in concluding as it did that "there was no reason why it should secure protection other than that afforded by an indemnifying policy which would be available in case a fire should occur under such circumstances as would render it liable as bailee." 48 F. 2d at 140-141.

It is not intended here to suggest an exhaustive list of the factors which are material on the question of intent. Many situations arise in modern commerce where, although the bailee is not answerable for the loss, nevertheless it is to his interest to effect such insurance for the benefit of the bailor. The bailee may wish to avoid the annoyance and ill-will generated by claims for loss, however poorly founded in law such claims may be. In such case, a liability policy would be quite inadequate. Or both bailor and bailee may desire to avail themselves of such a policy because of the mere mechanics of the process of insurance. This seems to have been the case in the *Glyn* and *Waters* cases, supra, decided by the English Courts.

One interesting advantage which may be secured by the bailee in this fashion is that he may, in certain situations, avoid liability. This is illustrated by *The John Russell*, 68 F. 2d 901, 1934 A.M.C. 7 (C.C.A. 7th). There the insurance was paid for by the owner of a barge engaged in the transportation of wheat. The insurer paid the owner of the cargo following a loss, and sought to hold the owner liable by subrogation to the rights of the cargo interests. The court held that the fact the owner paid for the insurance was "persuasive" that the owner intended to retain the benefit of the insurance, and denied recovery. See also *Dixon-King*, 86 F. 2d 740, 1936 A.M.C. 891 (C.C.A. 6th).

With this discussion of the cases your committee hopes that it has pointed the way to ascertainment of the true nature of the rule respecting the policies of insurance of bailees and that its short analysis of the cases may lead to a clearer understanding.

The committee indulges in the hope that members of the association will be at least stimulated by the discussion to the point of making comments thereon and furnishing the committee with such suggestions as their experience may have indicated and thus assist in throwing additional light upon the subject.

Respectfully submitted,

R. W. Shackleford, Chairman
George E. Beechwood
William C. Fraser
Newton Gresham
Daniel Mungall
Joseph W. Popper
Alexis J. Rogoski
C. B. Snow
Don W. Stewart
Frank X. Cull, Ex-Officio.

Report of Committee on Highway Safety and Financial Responsibility

VICTOR C. GORTON, *Chairman*
Chicago, Illinois

Highway Safety

WHEN President Truman's attention was called to the alarming fact that traffic fatalities during the closing months of 1945 had increased 40 per cent over those for the same period of the previous year, he exclaimed: "We can no longer tolerate this awful drain upon our human and material resources!" Demanding prompt action upon a national scope to avoid a threatened holocaust since 1946 appeared likely to equal the record terrible traffic toll of 1941, the President called his Highway Safety Conference to meet in Washington, May 8th, 9th and 10th and appointed Major General Philip B. Fleming, Public Works Administrator, to serve as chairman. It was pointed out that the President's Highway Safety Conference was called not for new purposes nor to propose untried remedies, nor to inaugurate new movements, but to bring renewed national interest and support to adequate plans for dealing with the situation already in being.

The programs initiated and encouraged by Herbert Hoover, himself an engineer greatly interested in safety, in the period 1924 to 1928, well established all technical approaches to the problem of traffic safety. For some years, therefore, there has been general agreement on them. They have been broadly grouped under the three famous E's: Engineering, Education and Enforcement. And presently the greatest of these is Enforcement. Hope for great improvement in enforcement can be found in some measure in the building up of our municipal and state traffic police forces from the ranks of young military police who were well trained during the war. They can and will bring a needed alertness, discipline and spirit as career men in such organizations. Many prominent insurance men including lawyers served actively on the major committees of the conference including not only the seven working on particular phases of the safety program, but also the one for organized public support of all recommendations made by the Conference.

General Fleming opened the great meeting, attended by over 1,700 persons, who had been invited there to have the opportunity to express their personal interest in, and to learn how to work for, highway safety. He then called upon the President. Mr. Truman, recalling his interest in the subject as a senator, spoke with great vigor and earnestness for the accomplishment of the objectives of the Conference and for the adoption of an enforcement of uniform rules of the road by the state and local governments.

On the second day the audience listened as Justice Douglas of the Supreme Court pointed out that the problem was one that must be understood and supported from the "grass roots" to be most effective. Gov-

ernor Martin of Pennsylvania, chairman of the Governors' Conference, spoke for the necessity of real enforcement at the local level. Representative Clare Boothe Luce, whose daughter was killed in an automobile accident in California, impressed her audience as she pleaded for the local communities and individuals to solve the problem.

Seven great committees were to consider and report on the seven broad aspects of the traffic safety problem as follows: Accident records, Engineering, Education, Laws and Ordinances, Enforcement, Motor Vehicle Administration and Public Information. The eighth reported upon Organized Public Support for the entire program adopted by the Conference. The final reports of the several committees, each containing its individual findings and recommendations, after two days of conferences, were submitted, approved by the Conference and printed. All committee reports were splendid, clearly representing the best thought of our ablest minds on all phases of the traffic safety problem.

The Committee on Accident Records recommended that the collection and analysis of traffic accident reports be put on an effective basis throughout the country and that full use be made of these records as a foundation for findings and guides to highway safety activities. It recommended the "Manual on Uses of Accident Records" by the National Conference on Uniform Traffic Accident Statistics, and pointed out that the accident records are not a by-product of but an essential aid to policy making and the wisest expenditure of public funds to prevent accidents.

The Committee on Engineering recommended that those engineering principles and practices heretofore developed for the elimination or reduction of the physical traffic hazards and for the control of traffic for safety be fully used by all agencies. Valuable specific recommendations were made for continuation of improvement in the automobile and its equipment in all the things that make for safety, for highway and terrain improvements in many ways and for specific procedures for accomplishing their objectives.

The Committee on Education recommended that our schools of all grades have traffic safety programs to give full information and guidance in accident prevention to more than 30 million students, making the important point that we have the best opportunity to inculcate safe walking and safe driving knowledge and practices in the children and youths who must carry on future responsibilities for safety in a fully developed motor age. Valuable specific recommendations were made covering elementary schools, high schools and other preparatory schools, colleges and universities, teacher education in college for safety training, and pupil transportation by bus.

The Committee on Laws and Ordinances laid particular stress upon the great aid which will flow from all motorists knowing the fundamental man-made laws of traffic flow, and therefore that such laws to the greatest extent possible must be uniform and be interpreted alike in every State, county, and municipality. Strongly urging uniformity and adequacy of state statute and municipal ordinance, except for strictly local zone conditions, the committee made many important specific recommendations for action and procedure, emphasizing the continued great need of adoption by all states and municipalities of the Uniform Vehicle Code and Model Traffic Ordinance heretofore drawn and revised by similar conferences.

The Committee on Enforcement recommended that States and cities carry on continuously intensive programs of traffic law enforcement of the kind that will result in the highest level of voluntary law observance and the exercise of care by driver and pedestrian, and pointed out that this could best be done by having fitting punishment for serious offenses, surely follow the violations (such action to be both punitive and educational). The strong point was made that the motorists have a natural tendency to obey the laws which are enforced daily on the highways and in the traffic courts rather than those written in the books. General recommendations were made that the traffic courts, prosecuting attorneys and traffic police be adequate in number, well selected and trained, be given all needed equipment for efficient work and have the benefit of sound leadership, direction and administration. It was strongly urged that corruption and nullification of safety effort flow from political interference and spec-

ial privilege, and that they be eliminated. Many specific recommendations were made for the guidance of courts, prosecutors and police.

The Committee on Motor Vehicle Administration recommended to the states: one, the adoption of sound policies for licensing of drivers and training of examiners; two, the bringing of the state motor vehicle departments up to parity with other state departments; three, the adoption of improved financial practices in the departments; four, employment of the merit system to provide adequate, qualified personnel. The Committee emphasized the need for re-examination of drivers involved in accidents or traffic violations. It further recommended that provision for the maintenance and analysis of complete motor vehicle records be made. The states were urged to give financial support to the American Association of Motor Vehicle Administrators and the Administrators were urged to improve staffs for driver education and training, to encourage wider adoption of sound financial responsibility laws which promote safety by giving additional control over driver licensing, and to recommend establishment of periodic motor vehicle inspection on the basis of standards set out in article V of the Uniform Motor Vehicle Code.

The Committee on Public Information recommended aggressive, continuing efforts by all public officials and other interested persons and organizations, most particularly the several media of public information: newspapers, magazines, trade journals and house organs, radio and motion pictures, outdoor advertising and display, and all volunteers in the cause of safety, to tell the public the facts about highway safety. The Committee stressed the importance of fullest publicity to assure public understanding of the personal, social and economic effects of automobile accidents, of where, when, how and why they occur, of the efforts and their results by all persons working for traffic safety. A further recommendation was that information supplied the public should aim to promote wider understanding and support for the measures recommended by the conference for engineering, education and enforcement.

The closing session of the Conference acted upon the committee reports and adopted a multi-point program—the Plan of Action (presented by the Committee on Organized Public Support) for recommendation to the states, municipalities and the general public, as follows:

1. That three Committees of independent and equal status be formed to coordinate a highway traffic safety program on a nation-wide basis consisting of:

(a) Coordinating Committee for Federal Departments, consisting of representatives of such Federal Departments or subdivisions thereof as have legal responsibilities in the field of highway safety, to coordinate the highway safety activities of all Federal agencies, and to encourage cooperation of the Federal government with the agencies of the several State and local governments and with national non-official organizations, through the appropriate national committee outlined below in b. or c.

(b) National Committee of State officials. This committee of presidents of various associations of State officials having to do with highway traffic, to apply the technical recommendations of the President's conference to State traffic conditions, to find the needs for development of official highway safety programs, to coordinate activities and jurisdictions and tell the public currently of all results, findings, problems and plans.

(c) National Committee of non-official organizations. This Committee to be composed of representatives secured country-wide from national organizations of all kinds, non-official but a cross section of America interested in traffic safety. It will coordinate efforts of all such organizations and advise, stimulate and assist, but not direct the actual operating organizations in traffic control, and cooperate with the other two national committees recommended in the Plan of Action. It was suggested that an expanded National Committee for Traffic Safety, might well be the organization to serve as this third national committee.

2. And then on the State level, it was suggested that the Governor of each State, should follow the Federal example and set up a coordinating Committee of

officials for the official State Highway Safety program, consisting of heads of State departments having to do with highway safety. This Committee to apply the technical recommendations of the President's Conference to find the requisites for the official State highway safety program, to acquaint the public with all findings, results and plans, and to arrange the best means of working together with State organizations of county and municipal officials in both State and local activities.

3. That the Governor of each State meet the critical traffic accident conditions by calling a State Highway Safety Conference and proceed after the manner and form of the Federal meetings to adopt and carry out the technical highway safety program of the President's Conference to the needs of the particular State. And for the Governor at the same time to take the leadership to form a State-wide traffic safety organization, if the State has none, to be strictly non-political and made up of all State-wide organizations, Committees and individuals able, willing and interested to contribute to the solution of the traffic safety problem, and to have a full time paid Executive Director.

4. Finally, on the most important local level, chief executives of county and municipal governments should follow the same procedures as outlined for the states. That all organizations and individuals endorse and support the recommendations of the President's Highway Safety Conference, all official traffic safety programs and use all means to inform memberships of the technical program and the problems of applying it to local needs in highway safety, thereby making for individual understanding and acceptance of responsibility. That they continue active support of the important supplemental highway programs of the Police Traffic Safety Check, National Traffic Safety Contest and the National Pedestrian Protection Contest.

First place awards in these two national contests were made. In the National Traffic Safety Contest, Ned H. Dearborn, president of the National Safety Council made the presentations to the grand award state, Iowa and the grand award city, Wichita. H. J. Brunnier, president of the American Automobile Association presented the award in the National Pedestrian Protection contest to the winner, the City of Detroit.

Upon the keynote of great hope and earnest endeavor, closed this latest and perhaps greatest of the national highway safety conferences. It had hurled one of the most vitally important challenges to the citizenry of America today: the need to reduce automobile accidents. It had pointed out that continuation of the early 1946 rate of automobile killing and injuring would involve a total of 1,338,000 men, women and children, comparable to the entire population of one of our major cities. Our approach to a solution of the problem must be positive and constructive with no room in our thinking for defeatism because records show these accidents can be greatly reduced by carrying out vigorous, all inclusive traffic safety programs.

There is a strong impression among people highly experienced in traffic safety work that the legal profession as a whole has not played a conspicuous part in the promotion of traffic safety. However, it should be added that in recent years the American Bar Association has joined with the National Safety Council in a vigorous program for the improvement of traffic courts. Certainly we insurance counsel have the best of reasons to support all sound measures for the reduction of traffic accidents which cost our client insurance companies so many hundreds of millions of dollars in claims. In the long run, our insurance company clients can save far more money by unselfishly throwing the full weight of their influence to the elimination of drunken or reckless driving through strict and unfailing law enforcement against those clearly guilty, than they can save by any other action. And aside from the financial saving, can we be sure that none of us, nor a loved one of ours, will be included among the victims (much over a million expected) of drunken and reckless driving in 1946?

Automobile transportation is now such an integral part of the daily lives of all of us that safety has become a vital necessity and the duty of every one of us personally. Not just for the other fellow, but now at last for you and me is the need

every day for unselfish devotion to the cause of automobile safety. These automobile accidents cause most tragic and needless loss of human lives, untold human suffering and sorrow, and vast economic waste. There is great opportunity now and from now on, for every individual to take his place and do his part for traffic safety, as the decision to be safe or sorry finally comes home to the man at the wheel.

FINANCIAL RESPONSIBILITY

The committee undertook consideration of a problem which, under the new strict type of financial responsibility laws of about fifteen states, appears to be of concern to the automobile insurance policyholder, his insurer, the injured claimant and the public at large. The responses to such solicitation indicate that categorical answers cannot be given to the questions presented and that they can be answered only according to interpretation of the phraseology of the particular financial responsibility law involved.

The strict financial responsibility laws require that, upon occurrence of an accident (involving bodily injury or property damage of varying amounts) to avoid suspension of the license of its insured the insurer is called upon to file with the state a certificate of insurance (from S.R. 21) which provides in part: "the company signatory hereto gives notice that its policy No. _____ issued to _____is an automobile liability policy in form approved by the Commissioner (Director) of Insurance affording limits of $5,000/10,000 bodily injury and $1,000 property damage, *which policy was in effect on the date of the above described accident.* (Emphasis supplied).

The following is an excerpt from the Oregon financial responsibility law:

> "Not less than 10 days nor more than 45 days after receipt by him of the report or notice of an accident * * * the Secretary of State shall suspend the license of any person operating, and the registration certificates and registration plates of any person owning a motor vehicle in any manner involved in such accident unless and until such owner or operator or chauffeur or both shall immediately furnish and thereafter maintain proof of financial responsibility."

The Illinois provision is a little different than those found in other laws in that it provides "within 30 days." The Illinois provision follows:

> "The Department * * *, within thirty days after receipt of a report of a motor vehicle accident * * * shall certify to the Secretary of State the name of each operator or owner who the Department shall determine is required to deposit security.
>
> The Secretary of State, within thirty days after receiving from the Department * * the certifications * * shall suspend the license of each operator and all registrations of each owner certified as required to deposit security."

In connection with the foregoing quoted excerpts from the law it should be noted that the authority of the state department to suspend license is limited to a certain period. Of course, if other sections of the law permit, as does the law of New York, the department to suspend license for any good and sufficient reason, the power to suspend license after the expiration of the period provided in the quoted excerpt may have a direct bearing upon the matters hereinafter discussed.

Not infrequently the insurer discovers, either before or after filing the certificate, that it has or may have a policy defense against its insured for breach of some policy declaration or requirement.

Where the accident (with respect to which the insurer is asked to file) has happened during the term of a policy which the insured was not required to carry as an alternative to having his license suspended (for example, because of a prior accident or traffic law violation)—in other words, during the term of a policy voluntarily purchased by the insured to protect his right to drive in the event of *future* accident—what is the effect of the insurer's filing of form SR 21 upon the rights of the injured claimant, the insured, the insurer and the public at large in the following situations:

> (1) Where, at the time of filing, the insurer either knew or was chargeable with knowledge of facts which indicated

that it had or might have a policy defense?

Some of the committee members were of the opinion that the insurer in such circumstances had, through the waiver route (voluntary relinquishment of known right presumed because of action taken inconsistent with intent to assert policy defense), lost its right to disclaim liability to the insured. It was submitted that the filing of the form SR 21 which expressly provides that the "policy was in effect on the date of the above described accident" is consistent only with the intent to disregard any policy breach which may have been known to exist at the time the form was filed, especially where the insurer had failed to notify the state department and its insured that it intended to preserve its right to disclaim policy obligation. On the other hand, it was submitted that such filing is merely a certification that at the time of accident there was a policy in effect and that it does not certify as to the validity of the policy nor to the absence of a policy defense.

The question was posed that the insurer, through the estoppel route (conduct which has misled the injured claimant to his prejudice) had lost its right to disclaim liability on the policy with respect to the cause of action of the injured claimant. This, on the assumption that such claimant is thus misled into believing that the financial responsibility of the insurer stands behind the alleged tort feasor and for that reason he has neglected to press his legal rights against the defendant. Furthermore, it may be contended that, by reason of the insurer's filing, the person or persons named in the certificate are thus permitted to continue legally to operate an automobile and that the claimant is thus deprived of what would ordinarily be a powerful incentive on the part of such person or persons to effect compromise settlement in order to regain or retain his or their right to drive. However, some of the committee members state that they believed it would be almost impossible for the claimant to prove legal prejudice.

The query next presented was to what extent a finding of waiver or estoppel could be precluded by the insurer's action in securing a non-waiver agreement from its insured or serving upon him a notice of reservation of its rights, before filing the certificate. If the effect of waiver or estoppel were confined to the insured, then such agreement or such notice should protect the insurer. But the financial responsibility laws are intended for the benefit of the injured public and such express or tacit private agreements, to which the injured person is not a party, it was submitted should have no effect as to him if he can show legal prejudice resulting from the filing of the SR 21 and the subsequently permitted withdrawal thereof.

2. Next was considered the effect of the filing where the insurer, afer filing, secures knowledge of facs apparenly affording a policy defense and promptly serves notice of reservation or secures a non-waiver agreement. It was the consensus that, in fairness to the insurer, it should not be deprived of the policy defense in such circumstances. However, it was agreed that such unfair result might well exist where the financial responsibility law itself does not admit of such interpretation as would allow the insurer to withdraw its filing. Whether the insurer acted promptly to revoke its filing (where the law so permits) was thought to be of importance relative to the question of whether estoppel or waiver might thereafter preclude a successful disclaimer of liability.

The foregoing emphasizes the possible effect of waiver or estoppel. But this somewhat elusive question may be approached from another angle which to some extent disregards waiver or estoppel. What is the effect on the legal relations between the insurer and the insured of the filing of the certificate where there is a question of the validity of the policy because of the insured's alleged breach of either:

(a) A condition precedent, such as making a false declaration as to his previous license history.

(b) A condition subsequent, such as failing to give prompt notice of accident, or breaching of cooperation clause.

With regard to both (a) and (b), it was thought to be of primary importance to determine, with respect to the law of the

particular state concerned, whether the statute itself would be interpreted to intend that the filing of the certificate shall preclude the insurer from later taking advantage of a possible defense which came to light either before or after the filing. If the statute clearly shows intent to effect such a result, then the element of waiver or estoppel is irrelevant.

It was the consensus that the state laws, generally speaking, are not at all clear on this point—but it was felt that if the particular law did not permit suspension of licenses after the expiration of a certain period, that fact may operate to preclude the insurer from thereafter revoking its filing, and further that the insurer's financial responsibility should stand behind that of the insured with regard to any successful claim made against the latter. This, on the ground that if it is a question as to whether the insurer on the one hand, or the claimant and the general public on the other, are to suffer prejudice as a consequence of the insurer's action in filing, since it is clearly the intent of the law that the person who is financially irresponsible should be prevented from driving, and since the alleged insured was not prevented from driving, the insurer must bear the burden.

However, it was suggested that ultimately it may be held that Form SR 21 certifies only as it recites on its face, that at the time of the accident there was a policy *in effect* (as distinguished from a certification as to the validity of the policy at such time, the policy being not void but voidable at the election of the insurer when it discovers a policy breach. Under such hypothesis, it would seem reasonable that the procedure respecting Form SR 21 under the new strict type financial responsibility legislation is collateral to the legal relations established by the policy between the insurer and the insured and not necessarily determinative of such relations. There seems to be nothing in either the general or statutory law which has a bearing on whether or not such position is sound. The fact that this legislation is silent on the legal effect of filing, with respect to insurer's right of defense on the policy, where similar legislation respecting *required* automobile liability policies is not silent, suggests that the legislature did not intend the insurer to lose its defense in the absence of waiver or estoppel.

The Committee felt that the filing of the SR 21 form should not operate to preclude the insurer from having the advantage of a policy defense which it ascertained with all reasonable dispatch, but which was found to exist or which came into being after it had made the filing. To implement such result, it was the consensus that the laws be amended (a) to expressly state the effect of the insurer's filing either before or after discovery of a policy defense, and (b) to permit the state authority to suspend licenses at any time after the particular accident and not only within a very limited period. A recent amendment to the New York law (Chapter 118 of the Laws of 1946, approved March 14, 1946) permits the Commissioner to revoke licenses "upon any reasonable ground appearing from the records of his Bureau."

It is submitted that such amendments would permit suspension of licenses at any time and would allow the insurer to revoke its filing without, at the same time, permitting the alleged insured to continue to drive. It was felt that if the insurer could be allowed to have the benefit of bona fide policy defenses and if at the same time neither the claimant or the general public were prejudiced by allowing the insurer to have such advantage, the law should be changed clearly to effect such a result. It is the Committee's opinion that the laws should be so changed.

Respectfully submitted,

Victor C. Gorton, *Chairman*
George Burns
Lewis R. Doyle
Aubrey F. Folts
Byron Edward Ford
John E. Foster
William A. Kelly
L. Duncan Lloyd
Ernest A. Rich
Carl C. Riepe
Francis M. Holt, *Ex-Officio*

International Association of Insurance Counsel

Report of R. M. NOLL, *Treasurer*
Marietta, Ohio
August 1, 1945 to July 31, 1946

RECEIPTS

1945—July 31	
BALANCE, Cash on Hand and Series "G" Bonds	$24,773.89
INTEREST on "G" Bonds	187.50
COLLECTION of Dues	408.00
JOURNAL Subscriptions	76.72
INTEREST on Savings Account, The Citizens Bank Company, Beverly, Ohio	20.38
1946	
DUES collected in 1946	12,543.00
OSCAR J. BROWN, proceeds from New York Luncheon	14.49
CASH received from David I. McAlister, Secretary—Mid-Winter Meeting, Cocktail Party and Banquet	24.00
INTEREST on "G" Bonds	187.50
JOURNAL Subscriptions	16.00
INTEREST on Savings Account, The Citizens Bank Company, Beverly, Ohio	20.49
TOTAL RECEIPTS	$38,271.97

EXPENDITURES

SECRETARY	$ 1,582.26
TREASURER	779.86
JOURNAL	4,098.67
CINCINNATI MEETING — Selection of Committees	227.40
MID-WINTER MEETING	1,615.41
REFUND TO MEMBERS	96.00
PRINTING AND STATIONERY	144.65
POSTAGE AND EXPRESS	156.59
LEGISLATIVE COMMITTEE	5.70
CONVENTION — 1946	218.71
TOTAL EXPENDITURES	$ 8,925.25

RECAPITULATION

TOTAL RECEIPTS (Cash on hand, Savings Account and "G" Bonds)	$38,271.97
TOTAL EXPENDITURES	8,925.25
BALANCE ON HAND, August 1, 1946	$29,346.72

The Balance of $29,346.72 is deposited as follows:

The Peoples Banking and Trust Co., Marietta, Ohio—Checking Account	$10,228.05
The Citizens Bank Company, Beverly, Ohio, Savings Account, which draws 1 per cent interest	$ 4,118.67
"G" War Bond, No. 83267-G, registered in the name of "R. M. Noll, Treasurer, The International Association of Insurance Counsel"	$ 5,000.00
"G" War Bond, No. V-212522-G, registered in the name of International Association of Insurance Counsel, R. M. Noll, Treasurer, Peoples Bank Bldg., Marietta, Ohio, an unincorporated Association"	$ 5,000.00
"G" War Bond, No. V-188733-G, registered "International Association of Insurance Counsel, Marietta, Ohio, an unincorated Association	$ 5,000.00

Respectfully submitted,
R. M. NOLL, *Treasurer.*
Marietta, Ohio.

Report of David I. McAlister, Secretary

Washington, Pa.

THE enrollment at the 1944 convention totaled 1,275. Since that time 216 new members have been elected to membership in the Association and two old members have been reinstated. There were 56 resignations in the period from the 1944 convention until the start of this convention and 17 were dropped for non-payment of dues. There were 29 deaths in the membership, giving a net total of 1,391

members. This is classified as 1,022 regular members, 351 associate members and 18 members still in service who pay no dues during their military service. At the meeting of the Executive Committee on Tuesday evening, 39 more persons were elected to membership, giving at the present time an over-all total of 1,430 members.

It is perhaps in the province of the Editor of the Journal or of the Treasurer to mention the fact that the increasing size of our conventions and the increase in cost of practically everything necessary to the success of a convention, leads your Secretary to suggest certain things. First, the possible increase in dues to $15 for regular members and $5 for associate members and/or a registration fee for the convention. I am reliably informed that the American Bar Association is this year adopting a convention registration fee. The Secretary's Office handles approximately 7,500 pieces of mail, incoming and outgoing, per year, and there were a minimum of difficulties in the Secretary's Department until the eve of Monday, September 2, 1946, at which time approximately 50 per cent of the membership attending this convention wanted a different room than the room they had. Your Secretary was then charged with the responsibility of bringing the convention to Pennsylvania and the Secretary is willing to assume that responsibility, also the responsibility for the scenery, food and weather. The Secretary, however, declines to accept the responsibility for the design of the hotel, never having met nor seen the architect, and I, therefore, suggest to those persons that they take up their complaints direct with the architect of the hotel or file a brief.

Report of Memorial Committee

By John L. Barton
Chairman
Omaha, Nebraska

IT is fitting that this gathering should pause for a time from its activities to pay tribute to the memory of those of our members who have passed into the great beyond since we last were in convention assembled.

There are those who say that the work of a lawyer is written upon water. That it leaves no permanent mark on the face of the earth or the life of the community. That the silver voice of the advocate which charmed courts and juries fades rapidly into oblivion. That the written words into which the lawyer has poured the work of his brain and his heart soon become a stack of forgotten papers reposing in musty files.

But this is a superficial view of the work and ideals of the profession we follow and which our departed brethren so richly adorned. As Rufus Choate once said, "In no other occupation to which men can devote their lives is there a nobler intellectual pursuit or a higher moral standard than that which inspires and pervades the legal profession."

Character leaves its mark on a community no less than tangible monuments of man's achievements. The lives and characters of these outstanding followers of our honorable profession cannot fail to have a lasting influence upon the communities in which they lived and worked, as well as upon this Association of their friends and comrades. As Browning said:

> "All that is at all
> Lasts ever, past recall
> Earth changes, but thy
> soul and God stand
> sure."

Since our last meeting at Chicago in 1944, the following members of our Association have passed on.

James E. Anderson, Columbus, Ohio.
Albert D. Ayers, Reno. Nevada.
Charles W. Bagby, Hickory, N. C.
Wayne Bannister, Denver, Colo.
James A. Beha, New York, N. Y.
Lyle L. Beach, Chicago, Ill.
B. B. Bridge, Columbus, Ohio.
J. C. Cheney, Yakima, Wash.
James R. Clairborne, St. Louis, Mo.
James H. Corbitt, Suffolk, Va.

Harry E. Cryan, Boston, Mass.
Thomas A. Evans, Memphis, Tenn.
Oliver O. Haga, Boise, Idaho.
Oscar C. Hull, Detroit, Mich.
William H. Jackson, Tampa, Fla.
A. E. Kilmer, Madison, Wis.
A. Walter Kraus, Baltimore, Md.
James B. May, New York, N. Y.
Brainerd S. Montgomery, New Orleans, Louisiana.
John H. McNeal, Cleveland, Ohio
Frank W. Nesbitt, Wheeling, W. Va.
J. Francis O'Sullivan, Kansas City, Mo.
Ralph F. Potter, Chicago, Ill.
Charles W. Racine, Toledo, Ohio.
Richard Remke, Cincinnati, Ohio.
Clarence D. Roseberry, LeMars, Iowa.
John Morgan Stevens, Jr., Jackson, Miss.
Carl H. Smith, Stubenville, Ohio.
Karl W. Warmcastle, Pittsburgh, Pa.
Silas Williams, Chattanooga, Tenn.
Leonard F. Wing, Rutland, Vt.

As a slight expression of our sense of loss sustained in the passing of these, our friends, we ask you all to rise and stand in silent tribute to their memory.

Members' Registration—1946 Convention

Ahlers, Paul F., Des Moines, Iowa.
Albert, Milton A., Baltimore, Md.
Anderson, James Alonzo, Shelby, Ohio.
Anderson, John H., Jr., Raleigh, N. C.
Andrews, John D., Hamilton, Ohio.
Apperson, John W., Memphis, Tenn.
Atkins, C. Clyde, Miami, Fla.
Baier, Milton L., Buffalo, N. Y.
Baker, Harold G., East St. Louis, Ill.
Ball, Fred S., Jr., Montgomery, Ala.
Barber, A. L., Little Rock, Ark.
Bartlett, Thomas N., Baltimore, Md.
Barton, John L., Omaha, Neb.
Bateman, Harold A., Dallas, Texas.
Baylor, F. B., Lincoln, Neb.
Beard, Leslie P., New Orleans, La.
Beechwood, G. Eugene, Philadelphia, Pa.
Benson, Palmer, St. Paul, Minn.
Betts, Forrest A., Los Angeles, Calif.
Bisselle, Morgan F., Utica, N. Y.
Blanchet, G. Arthur, New York, N. Y.
Body, Ralph C., Reading Pa.
Bowman, Byrne A., Oklahoma City, Okla.
Braden, Emmett W., Memphis, Tenn.
Bronson, E. D., San Francisco, Calif.
Brown, Garfield W., Chicago, Ill.
Brown, Oscar J., Syracuse, N. Y.
Brown, William Russell, Houston, Tex.
Browne, Percy N., Shreveport, La.
Buchanan, G. Cameron, Detroit, Mich.
Buntin, W. E., Philadelphia, Pa.
Burke, Patrick F., Philadelphia, Pa.
Burns, George, Rochester, N. Y.
Burns, Lawrence, Jr., Coshocton, Ohio.
Caverly, Raymond N., New York, N. Y.
Cecil, Lamar, Beaumont, Texas.
Chalmers, William W., Chicago, Ill.
Chilcote, Sanford M., Pittsburgh, Pa.
Christovich, Alvin R., New Orleans, La.
Clark, James E., Birmingham, Ala.
Coleman, Fletcher B., Bloomington, Ill.
Combs, Hugh, Baltimore, Md.
Cope, Kenneth B., Canton, Ohio.
Cox, Taylor, Knoxville, Tenn.
Craugh, Joseph P., Utica, N. Y.
Crawford, Milo H., Detroit, Mich.
Crosby, George R., New York, N. Y.
Crownover, Arthur Jr., Nashville, Tenn.
Cull, Frank X., Cleveland, Ohio.
Daniel, Todd, Philadelphia, Pa.
Davidson, Carl F., Detroit, Mich.
Denmead, Garner W., Baltimoré, Md.
Dickie, J. Roy, Pittsburgh, Pa.
Diehm, Ellis Raymond, Cleveland, Ohio.
Dimond, Herbert F., New York, N. Y.
Dodson, T. DeWitt, New York, N. Y.
Don Carlos, Harlan S., Hartford, Conn.
Doucher, Thomas A., Columbus, Ohio.
Drake, Hervey J., New York, N. Y.
Drewry, W. Shepherd, Philadelphia, Pa.
Dunn, Evans, Birmingham, Ala.
Durham, F. H., Minneapolis, Minn.
Duvall, Duke, Oklahoma City, Okla.
Eager, Pat H., Jr., Jackson, Miss.
Ebeling, Philip C., Dayton, Ohio.
Eggenberger, W. J., Detroit, Mich.
Ely, Wayne, St. Louis, Mo.
Evans, Walter G., New York, N. Y.
Farabaugh, G. A., South Bend, Ind.
Farber, John A., Omaha, Neb.
Faude, John P., Hartford, Conn.
Fellers, James D., Oklahoma City, Okla.
Field, Elias, Boston, Mass.
Fields, Ernest W., New York, N. Y.
Fitzhugh, Millsaps, Memphis, Tenn.
Fitzpatrick, William, Syracuse, N. Y.
Flynn, James F., Sandusky, Ohio.

Foley, Michael A., Philadelphia, Pa.
Folts, Aubrey F., Chattanooga, Tenn.
Foster, John E., Columbus, Ohio.
Francis, Marshall H., Steubenville, Ohio.
Freeman, W. H., Minneapolis, Minn.
Gallagher, Donald, Albany, N. Y.
Gardere, George P., Dallas, Texas.
Gates, Cassius E., Seattle, Wash.
Geer, Arthur B., Minneapolis, Minn.
Gongwer, G. P., Ashland, Ohio.
Gongwer, J. H., Mansfield, Ohio.
Gooch, J. A., Fort Worth, Texas.
Gover, Charles H., Charlotte, N. C.
Grelle, Robert C., Madison, Wis.
Gresham, Newton, Houston, Texas.
Grooms, Hobart, Birmingham, Ala.
Grubb, Kenneth P., Milwaukee, Wis.
Hannah, Richards W., New York, N. Y.
Harvey, Thomas P., Hartford, Conn.
Heneghan, George E., St. Louis, Mo.
Henry, E. A., Little Rock, Ark.
Henry, John A., Chicago, Ill.
Heyl, Clarence W., Peoria, Ill.
Hinshaw, Joseph, Chicago, Ill.
Hobson, Robert P., Louisville, Ky.
Hocker, Lon O., St. Louis, Mo.
Horn, Clinton M., Cleveland, Ohio.
Howard, Frank, Worcester, Mass.
Johnson, E. M., Lumberton, N. C.
Johnson, F. Carter, Jr., New Orleans, La.
Jordan, Welch, Greensboro, N. C.
Kammer, Alfred C., New Orleans, La.
Kelly, William A., Akron, Ohio.
King, Oliver K., White Plains, N. Y.
Kitch, John, Chicago, Ill.
Kluwin, John A., Milwaukee, Wis.
Knepper, William E., Columbus, Ohio.
Knight, Harry S., Sunbury, Pa.
Knowles, William F., Kansas City, Mo.
Kramer, Donald W., Binghamton, N. Y.
Kristeller, Lionel P., Newark, N. J.
LaBrum, J. Harry, Philadelphia, Pa.
Lacey, Ralph B., Detroit, Mich.
Lancaster, J. L., Jr., Dallas, Texas.
Landis, M. L., Van Wert, Ohio.
Lazonby, J. Lance, Gainesville, Fla.
Levin, Samuel, Chicago, Ill.
LeViness, Charles T., III, Baltimore, Md.
Lloyd, Frank T., Jr., Camden, N. J.
Lloyd, L. Duncan, Chicago, Ill.
Locke, L. J., Chicago, Ill.
Long, T. J., Atlanta, Ga.
Lucas, Wilder, St. Louis, Mo.
Mahoney, G. P., Minneapolis, Minn.
Mangin, William B., Syracuse, N. Y.
Manier, Miller, Nashville, Tenn.
Manier, Will R., Jr., Nashville, Tenn.
Marshall, L. B., Chicago, Ill.
Martin, W. Francis, New York, N. Y.
May, Philip S., Jacksonville, Fla.
Mehaffy, James W., Houston, Texas.
Merrell, C. F., Indianapolis, Ind.
Meyers, Allen, Topeka, Kansas.
Moeller, Frederick A., Boston, Mass.
Morris, Stanley C., Charleston, W. Va.
Morse, Rupert G., Kansas City, Mo.
Moser, W. Edwin, St. Louis, Mo.
Murphy, Joseph H., Syracuse, N. Y.
Musgrave, Edgar C., Des Moines, Iowa.
McAlister, David I., Washington, Pa.
McCamey, Harold E., Pittsburgh, Pa.
McComas, Charles H., Bel Air, Md.
McDonald, W. Percy, Memphis, Tenn.
McGinn, Denis, Escanaba, Mich.
McGough, Paul J., Minneapolis, Minn.
McInerney, Wilbert, Washington, D. C.
McKesson, Theodore G., Phoenix, Ariz.
McNeal, Harley J., Cleveland, Ohio.
Nelson, Robert M., Memphis, Tenn.
Niehaus, John M., Chicago, Ill.
Noll, Robert M., Marietta, Ohio.
Nordmark, Godfrey, Denver, Colo.
O'Kelley, A. Frank, Tallahassee, Fla.
Olds, James, Akron, Ohio.
Orr, George Wells, New York, N. Y.
Parker, G. W., Jr., Fort Worth, Texas.
Parker, Leo B., Kansas City, Mo.
Parnell, Andrew W., Appleton, Wis.
Pledger, C. E., Jr., Washington, D. C.
Poore, Harry T., Knoxville, Tenn.
Porteous, W. A. Jr., New Orleans, La.
Powell, Arthur G., Atlanta, Ga.
Priest, Myrl, St. Paul, Minn.
Pringle, Samuel W., Pittsburgh, Pa.
Proctor, Charles W., Worcester, Mass.
Quinn, Henry I., Washington, D. C.
Randall, John D., Cedar Rapids, Iowa.
Reeves, G. L., Tampa, Fla.
Reynolds, Hugh E., Indianapolis, Ind.
Riepe, Carl C., Burlington, Iowa.
Roberts, H. Melvin, Cleveland, Ohio.
Roberts, Melvin M., Cleveland, Ohio.
Rode, Alfred, Seattle, Wash.
Roemer, Erwin W., Chicago, Ill.
Rogoski, Alexis J., Muskegon, Mich.
Rollins, H. Beale, Baltimore, Md.
Rowe, Royce G., Chicago, Ill.
Ryan, Lewis C., Syracuse, N. Y.
Ryan, Stanley M., Janesville, Wis.
Sadler, W. H., Jr., Birmingham, Ala.
Saxby, Russell G., Columbus, Ohio.
Schisler, J. Harry, Baltimore, Md.
Schlipf, Albert C., Springfield, Ill.
Schneider, Philip J., Cincinnati, Ohio.

Schultz, Peter A., Buffalo, N. Y.
Scroggie, Lee J., Detroit, Mich.
Seiler, Robert E., Joplin, Mo.
Shackleford, R. W., Tampa, Fla.
Shapiro, Joseph G., Bridgeport, Conn.
Shipman, F. L., Troy, Ohio.
Skutt, V. J., Omaha, Neb.
Slaton, John M., Atlanta, Ga.
Smith, Clater W., Baltimore, Md.
Smith, Forrest S., Jersey City, N. J.
Smith, Willis, Raleigh, N. C.
Smith, William P., Chicago, Ill.
Snow, C. B., Jackson, Miss.
Snyder, Henry L., Allentown, Pa.
Spray, Joseph, Los Angeles, Calif.
Sprinkle, Paul C., Kansas City, Mo.
St. Clair, Ashley, Boston, Mass.
Stewart, Joseph R., Kansas City, Mo.
Stichter, Wayne E., Toledo, Ohio.
Strite, Edwin D., Chambersburg, Pa.
Swartz, C. Donald, Philadelphia, Pa.
Sweet, Joe G., San Francisco, Calif.
Sweitzer, J. Mearl, Wausau, Wis.
Taylor, Edward I., Hartford, Conn.
Thornbury, P. L., Columbus, Ohio.
Tobin, Robert P., Chicago, Ill.
Topping, Price H., New York, N. Y.
Touchstone, O. O., Dallas, Texas.
Townsend, Mark Jr., Jersey City, N. Y.
Tucker, Warren C., Utica, N. Y.
Van Orman, Francis, Newark, N. J.
Van Orman, Wayne, New York, N. Y.
Wagner, Richard C., New York, N. Y.
Warren, F. G., Sioux Falls, S. D.
Wassell, T. W., Dallas, Texas.
Watrous, Charles A., New Haven, Conn.
Watson, James W., Memphis, Tenn.
Webb, Robert L., Topeka, Kansas.
Weichelt, George M., Chicago, Ill.
Weiss, Stuart Paul, New Orleans, La.
Werner, Victor Davis, New York, N. Y.
White, Harvey E., Norfolk, Va.
White, Lowell, Denver, Colo.
Whitfield, Allen, Des Moines, Iowa.
Wilbert, Paul L., Pittsburg, Kansas.
Wiles, Arthur W., Columbus, Ohio.
Winkler, John H., Columbus, Ohio.
Woodard, E. C., Chicago, Ill.
Woodward, Ernest, Louisville, Ky.
Yancey, George W., Birmingham, Ala.
Young, Robert F., Dayton, Ohio.
Zurett, Melvin H., Rochester, N. Y.

Guest Registration—1946 Convention

Ahlers, Mrs. Paul F. (Amirretto), Des Moines, Iowa.
Anderson, Mrs. James Alonzo (Dorothy), Shelby, Ohio.
Anderson, Mrs. John H. Jr., (Snow), Raleigh, North Carolina.
Baier, Mrs. Milton L. (Madonna), Buffalo, New York.
Baker, Mrs. Harold G. (Bernice K.), East St. Louis, Illinois.
Ball, Mrs. Fred S. Jr. (Caroline), Montgomery, Alabama.
Bateman, Mrs. H. A. (Anita), Dallas, Texas.
Bateman, Hal, Dallas, Texas.
Baylor, Mrs. F. B. (Georgia T.), Lincoln, Nebraska.
Baylor, Jim, Lincoln, Nebraska.
Baylor, Nancy, Lincoln, Nebraska.
Beechwood, Mrs. George Eugene (Mary Winifred), Philadelphia, Pennsylvania.
Bennethum, William H., Wilmington, Delaware.
Bennethum, Mrs. William H. (Ann), Wilmington, Delaware.
Bisselle, Mrs. Morgan F. (Lucille), Utica, New York.
Brown, Mrs. Oscar J. (Mary), Syracuse, New York.
Brown, Mrs. William Russell (Ruth), Houston, Texas.
Burke, Mrs. Patrick F. (Mary), Philadelphia, Pennsylvania.
Burns, Mrs. George (Marjorie), Rochester, New York.
Caverly, Mrs. Raymond N. (Rene), New York, New York.
Cobbs, R. M., Akron, Ohio.
Coleman, Mrs. Fletcher B. (Frances), Bloomington, Illinois.
Cope, Mrs. Kenneth B. (Lela C.), Canton, Ohio.
Craugh, Mrs. Joseph P. (Lucille), Utica, New York.
Crawford, Mrs. Milo H. (Maurine), Detroit, Michigan.
Crownover, Mrs. Arthur, Jr. (Augusta), Nashville, Tennessee.
Cull, Mrs. Frank X. (Madeleine), Cleveland, Ohio.

Davidson, Mrs. Carl F. (Meredith), Detroit, Michigan.

Deak, William S., Reading, Pennsylvania.

Deak, Mrs. William (Grace), Reading, Pennsylvania.

Denmead, Mrs. Garner W. (Leonie), Baltimore, Maryland.

Dickie, Mrs. J. Roy (Mabel R.), Pittsburgh, Pennsylvania.

Diehm, Mrs. Ellis Raymond (Helen), Cleveland, Ohio.

Dimond, Mrs. Herbert F. (Helen B.), New York, New York.

Don Carlos, Mrs. Harlan S. (Mary W.), Hartford, Connecticut.

Doucher, Mrs. Thomas A. (Rose Mary), Columbus, Ohio.

Eager, Mrs. Pat H., Jr. (Ann), Jackson, Mississippi.

Ebeling, Mrs. Philip C. (Helen), Dayton, Ohio.

Eggenberger, Mrs. William J. (Elsie), Detroit, Michigan.

Ely, Mrs. Wayne (Amy Nelle), St. Louis, Missouri.

Farabaugh, Mrs. Gallitzen A. (Nano G.), South Bend, Indiana.

Farber, Mrs. John A. (Miriam), Omaha, Nebraska.

Field, Mrs. Elias (Margaret), Boston, Massachusetts.

Fillinger, Edward, Greensboro, North Carolina.

Fillinger, Mrs. Edward (Mary), Greensboro, North Carolina.

Fitzpatrick, Mrs. William (Margaret), Syracuse, New York.

Foley, Mrs. Michael A. (Eileen), Philadelphia, Pennsylvania.

Folts, Mrs. Aubrey F. (Frances L.), Chattanooga, Tennessee.

Force, Kenneth, New York, New York.

Francis, Mrs. Marshall H. (Pauline), Steubenville, Ohio.

Freeman, Mrs. W. H. (Catherine), Minneapolis, Minnesota.

Gallagher, Mrs. Donald (Rose Mary), Albany, New York.

Galyon, L. A., Knoxville, Tennessee.

Gates, Mrs. Cassius E. (Rosella), Seattle, Washington.

Geer, Mrs. Arthur B. (Marie), Minneapolis, Minnesota.

Gongwer, Mrs. G. P. (Alice), Ashland, Ohio.

Gongwer, Mrs. J. H. (Gladys), Mansfield Ohio.

Gooch, Mrs. J. A. (Adrienne), Fort Worth, Texas.

Gover, Mrs. Charles H. (Mary Mercedes), Charlotte, North Carolina.

Grelle, Mrs. Robert C. (Mae), Madison, Wisconsin.

Gresham, Mrs. Newton (Mary Frances), Houston, Texas.

Grubb, Mrs. Kenneth P., Milwaukee, Wisconsin.

Hamrum, A. U., Minneapolis, Minnesota.

Hannah, Mrs. Richards Wesley (Marie), New York, New York.

Hinshaw, Mrs. Joseph (Madeline), Chicago, Illinois.

Hinshaw, Miss Joan, Chicago, Illinois.

Hobson, Mrs. Robert P. (Allye), Louisville, Kentucky.

Hocker, Mrs. Lon O. (Esther), St. Louis, Missouri.

Horn, Mrs. Clinton M. (Mabel R.), Cleveland, Ohio.

Howard, Mrs. Frank, Worcester, Massachusetts.

Johnson, Mrs. F. Carter Jr. (Josephine), New Orleans, Louisiana.

Kammer, Mrs. Alfred Charles (Wilmuth,), New Orleans, Louisiana.

Kelly, Francis H., Flushing, New York.

Kelly, Mrs. Francis H. (Ruth), Flushing, New York.

Kitch, Mrs. John (Mary), Chicago, Illinois.

Knepper, Mrs. William E. (Lucille), Columbus, Ohio.

Knight, F. S., New York, New York.

Knight, Mrs. F. S. (Elsie), New York, New York.

Knowles, Mrs. William F. (Arlene), Kansas City, Missouri.

Korsan, Peter J., Philadelphia, Pennsylvania.

Kramer, Mrs. Donald W. (Gladys), Binghamton, New York.

Kristeller, Mrs. Lionel P. (Helen D.), Newark, New Jersey.

Kuhn, Ed W., Memphis, Tennessee.

LaBrum, Mrs. J. Harry (Catherine), Philadelphia, Pennsylvania.

Lacey, Mrs. Ralph B. (Nell), Detroit, Michigan.

Landis, Mrs. M. L. (Esther), Van Wert, Ohio.

LeViness, Mrs. Charles T. III (Hildegarde), Baltimore, Maryland.

Lloyd, Mrs. L. Duncan (Olivia), Chicago, Illinois.

Long, Mrs. T. J. (Mary), Atlanta, Georgia.

Lucas, Mrs. Wilder (Ruth), St. Louis, Missouri.

Mahoney, Mrs. Geoffrey P. (Mary J.), Minneapolis, Minnesota.

Mangin, Mrs. William E. (Clara), Syracuse, New York.

Martin, Mrs. William Frances (Catherine), New York, New York.

May, Mrs. Philip S. (Lillian), Jacksonville, Florida.

Mehaffy, Mrs. James W. (Mary Elise), Houston, Texas.

Meyers, Mrs. Allen (Winifred), Topeka, Kansas.

Morris, Mrs. Stanley C. (Leota), Charleston, West Virginia.

Morris, Stanley C., Jr., Charleston, West Virginia.

McAlister, Mrs. David I., Washington, Pennsylvania.

McAlister, Patricia, Washington, Pennsylvania.

McCarroll, Clarence, Owensboro, Kentucky.

McGinn, Mrs. Denis (Catherine), Escanaba, Michigan.

McGough, Mrs. Paul J. (Alice), Minneapolis, Minnesota.

McInerney, Mrs. Wilbert (Rosa), Washington, D. C.

McInerney, Phil, Washington, D. C.

McNeal, Mrs. Harley J. (Virginia), Cleveland, Ohio.

Nelson, Mrs. Robert M. (Marjorie), Memphis, Tennessee.

O'Connor, Gerald W., Albany, New York.

O'Connor, Mrs. Gerald W. (Mary B.), Albany, New York.

O'Kelley, Mrs. A. Frank, Tallahassee, Florida.

Overton, John V., Knoxville, Tennessee.

Parker, Mrs. G. W., Jr., Forth Worth, Texas.

Parker, Mrs. Leo B. (Cecile), Kansas City, Missouri.

Pledger, Mrs. Charles E., Jr. (Beryle), Washington, D. C.

Powell, Mrs. Arthur G. (Annie), Atlanta, Georgia.

Powell, Miss Esther Anne, Atlanta, Georgia.

Powell, Miss Martha, Atlanta, Georgia.

Pringle, Mrs. Samuel W. (Margaret), Pittsburgh, Pennsylvania.

Pringle, Samuel W., Jr., Pittsburgh, Pennsylvania.

Rennels, Lamont N., Dayton, Ohio.

Rennels, Mrs. Lamont N. (Mary), Dayton, Ohio.

Rhyne, Charles, Washington, D. C.

Rhyne, Mrs. Charles (Sue), Washington, D. C.

Riordan, Paul H., Worcester, Massachusetts.

Roantree, William F., Reading, Pennsylvania.

Roberts, Mrs. H. Melvin, Cleveland, Ohio.

Robinson, Nelson E., Binghamton, New York.

Robinson, Mrs. Nelson E. (Genevieve), Binghamton, New York.

Roemer, Mrs. Edwin W. (Rose), Chicago, Illinois.

Rollins, Mrs. H. Beale (Mary E.), Baltimore, Maryland.

Rowe, Mrs. Royce G. (Marie), Chicago, Illinois.

Ryan, Mrs. Lewis C. (Mildred H.), Syracuse, New York.

Ryan, Mrs. Stanley M. (Edith), Janesville, Wisconsin.

Saxby, Mrs. Russell G. (Elizabeth), Columbus, Ohio.

Scroggie, Mrs. Lee J. (Gertrude), Detroit, Michigan.

Seiler, Mrs. Robert E. (Faye), Joplin, Missouri.

Seymour, James O., Columbus, Ohio.

Seymour, Mrs. James O. (Jane), Columbus, Ohio.

Shackleford, Mrs. R. W. (Iva), Tampa, Florida.

Shapiro, Mrs. Joseph G. (Helen R.), Bridgeport, Connecticut.

Shea, John E., Chicago, Illinois.

Smith, Mrs. Forrest S. (Harriet), Jersey City, New Jersey.

Smith, Mrs. William P. (Elizabeth), Chicago, Illinois.

Smith, Mrs. Willis (Dollie), Raleigh, North Carolina.

Smith, Anna Lee, Raleigh, North Carolina.

Snyder, Mrs. Henry L. (Hilda W.), Allentown, Pennsylvania.

Spray, Mrs. Joseph (Loeta), Los Angeles, California.

Sprinkle, Mrs. Paul C. (Mary U.), Kansas City, Missouri.

St. Clair, Mrs. Ashley (Winifred), Boston, Massachusetts.

Stewart, Mrs. Joseph R., Kansas City, Missouri.

Stichter, Mrs. Wayne E. (Irene), Toledo, Ohio.

Stoudt, James W., Reading, Pennsylvania.

Strite, Edwin D., Jr., Chambersburg, Pennsylvania.

Strite, Nancy, Chambersburg, Pennsylvania.

Sweitzer, Mrs. J. Mearl (Margaret), Wausau, Wisconsin.

Topping, Mrs. Price H. (Barbara), New York, New York.

Watrous, Mrs. Charles A. (Dorothy C.), New Haven, Connecticut.

Webb, Mrs. Robert L. (Ruth), Topeka, Kansas.

Werner, Mrs. Victor Davis (June C.), New York, New York.

White, Mrs. Harvey E. (Mabel), Norfolk, Virginia.

White, Mrs. Lowell (Laura Louise), Denver, Colorado.

White, Olin J., Nashville, Tennessee.

Wilcox, William J., Allentown, Pennsylvania.

Wilcox, Mrs. William J. (Kitty), Allentown, Pennsylvania.

Wiles, Mrs. Arthur W. (Rosaleen), Columbus, Ohio.

Woodward, Mrs. Ernest (Allie), Louisville, Kentucky.

Woodward, Miss Alice, Louisville, Kentucky.

Young, Mrs. Robert F. (Kathryn), Dayton, Ohio.